TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 39

JOSE MARIA GASTELUM-QUINONES,
PETITIONER,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES.

No. 293

JOSE MARIA GASTELUM-QUINONES,
PETITIONER,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 39 PETITION FOR CERTIORARI FILED OCTOBER 27, 1961
NO. 293 PETITION FOR CERTIORARI FILED AUGUST 1, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. DEPARTMENT OF JUSTICE

DECISION—November 14, 1957

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones, aka Joe Gastelum aka Joe Vega

In Deportation Proceedings

Appeal

On Behalf of Respondent:

William M. Samuels, Esquire, 2334 Brooklyn Avenue, Los Angeles 33, California; and

Maynard J. Omerberg, Esq., 1741 N. Ivar Avenue, Hollywood 28, California.

Charges:

Order: Sec. 241(a), I&N Act (8 USC 1251(a))—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Lodged: None.

Application: None.

This is an appeal from the order of the special inquiry officer requiring respondent's deportation upon the ground stated above.

The special inquiry officer found that the respondent, a 57-year-old native and national of Mexico had been a resident of the United States since 1920 and that he had been a member of the Communist Party of the United States in Los Angeles, California after his entry. This finding was based upon testimony of witnesses Elorriaga and Scarletto. The respondent refused to testify on a claim of privilege. He made no application for discretionary relief.

The testimony is set forth in greatest detail by the special inquiry officer. There is no necessity to repeat it.

Counsel raises procedural objections. We have examined these carefully and find no prejudicial error was committed by the special inquiry officer. Respondent was informed of the nature of the proceedings. The charges against him were clear. He was represented by able counsel who was given the widest latitude in conducting his defense.

Counsel contends the record does not establish that respondent's membership was voluntary. The testimony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, [fol. 2] an attempt was made to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary.

The fact of Communist Party membership could be found upon the testimony of witness Scarletto alone. Scarletto collected Communist Party dues from the respondent; he attended many closed meetings of the Communist Party with him; and he observed the respondent over a reasonable period of time. Counsel attacks the reliability of Scarletto's recollection by pointing out that respondent had considerable difficulty in recalling dates concerning events personal and otherwise which were more recent than the fact of the respondent's membership. While the record reveals that the witness at first blush was unable to recall information concerning dates, at the conclusion of his testimony, both direct and on cross-examination, the information requested was elicited with considerable certainty. Moreover, despite the weakness he revealed in specifying the time of the occurrence of an event with exactness, his recollection for ordinary events of his life concerning

employment and places of residence appeared to be at least average. His recollection of his membership in the Communist Party, his recollection of collecting dues from the respondent, and their association together in a Communist Party unit was testified to with certainty and despite the intensive cross-examination to which the witness was subjected on three different occasions is unshaken. The witness's testimony concerning his association with the respondent gains added importance from the fact that it was the witness's task to observe on the activities and membership of the Communist Party as an informant for the Federal Bureau of Investigation.

In evaluating the witness's testimony we have taken into consideration the fact that he falsified his state of health when he applied for a policy of insurance in I.W.O. We have considered his explanation that he did this because at the instruction of the Federal Bureau of Investigation, he attempted to become a member of I.W.O., and feared that he would be rejected if his disability were disclosed. He testified that he made no claim for benefits under his policy and he showed a complete lack of interest in the facts concerning the issue of the policies to him. The witness testified that he falsified the information concerning his state of health because he believed it to be necessary in doing his duty. However, he stated flatly, that he did not believe it to be his duty to furnish untrue information at the deportation proceeding concerning respondent's membership and that he would not furnish false information. We have also taken into consideration the fact that at the outset the witness was not frank in regard to his marital history. However, we have noted that he furnished complete information upon being pressed on the point.

[fol. 3] Counsel's objection concerning the witness's refusal to furnish information concerning the nature of his employment at an aircraft firm relates to a collateral matter. The witness did furnish the name of his employer and the period of his employment. We believe that it was proper to honor his claim that he could not reveal the nature of his employment. Counsel had ample opportunity to seek the information he desired from respondent's em-

ployer who may have felt free to release the information. In any event, respondent furnished sufficient information to enable an investigation to be made as to his reputation among his fellow employees and his employer.

Witness Elorriaga's testimony that the respondent was a member of the Communist Party in 1949 and 1951 is not inconsistent with the testimony of witness Scarletto. Moreover, witness Scarletto testified that Elorriaga had been a member of the Communist Party unit at the same time that respondent had been a member. In evaluating the testimony of Elorriaga we have taken into consideration the fact that he failed to furnish information concerning his membership in the Communist Party when he applied for employment. The contention that sufficient opportunity for cross-examination was not permitted is without foundation. Counsel was afforded the widest latitude in conducting his cross-examination.

Counsel's contention concerning Elorriaga's membership in El Sereno Club and the 45th Concentration Unit overlooked the fact that the El Sereno Club continued in existence after the formation of the 45th Concentration Unit.

There is an inconsistency in the testimony of Elorriaga as to the number of times he saw the respondent in attendance at the 45th Concentration Club. The witness testified on May 1, 1956 that he recalled about two or three meetings of the 45th Concentration Club at which he had seen the respondent (p. 165). Previously, on April 30, 1956, he had testified that he had seen the respondent at about three or four meetings a month over a period of about three years (p. 167). We do not find it necessary to resolve the conflict which was not noticed at the hearing since we regard Elorriaga's testimony as corroborative and it establishes that the respondent was a member of the Communist Party.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman

[fol. 4]

BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

DECISION—May 12, 1958

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones, aka Joe Vega

In Deportation Proceedings

Motion

On Behalf of Respondent:

William M. Samuels, Esquire, 2334 Brooklyn Avenue, Los Angeles 33, California; and

Maynard J. Omerberg, Esquire, 1741 N. Ivar Avenue, Hollywood 28, California.

Deportable: Section 241(a), I&N Act (8 USC 1251(a))—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Application: Motion for reconsideration.

On November 14, 1957 we dismissed the respondent's appeal from the order of the special inquiry officer finding him deportable upon the ground stated above. Counsel has now submitted a motion for reconsideration of this order because of his belief that the decision in *Rowoldt* v. *Perfetto*, 355 U.S. 155, 2 L. Ed. 2d 140 requires the finding that the respondent's membership did not meet the requirement of meaningful association which the Supreme Court has set as a standard. The motion requests that, in the event reconsideration is denied, proceedings be reopened to enable the respondent to offer testimony to show that he can place himself within the framework of the rule laid down in *Rowoldt*. The Service has presented a memorandum in opposition to the motion and counsel for the respondent has submitted a reply memorandum.

The respondent refused to testify on the claim of privilege. Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness, Elorriaga.

[fol. 5] *Rowoldt* concerned an alien who had been a resident of the United States since 1914, had joined the Communist Party in 1935 and had remained a member until the end of the year. The Supreme Court set forth extracts from a statement he had made showing that his joining was not motivated by dissatisfaction with living under democracy, but was a fight for something to eat and clothes and shelter; and that the method to obtain this was to petition city, state and national governments. One other extract was quoted to show that the only active work the respondent had done in the Communist Party was to assist in the running of a bookstore at which Communist Party literature was sold. Rowoldt's recital of the circumstances which lead him to rejoin the Communist Party was not contradicted by evidence. The court held that "the unchallenged account given by the petitioner of his relations to the Communist Party [does not establish] the kind of meaningful association required" and that from Rowoldt's "own testimony in 1947, which is all there is, the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implications."

The obvious and most striking difference between *Rowoldt* and the instant case is that in *Rowoldt*, the sole information as to the existence of membership came from the respondent. He told why and how he had joined. From his explanation, there was nothing to show that he had joined the Communist Party of the United States knowing it to have been a political organization. The requirement that the membership must have been with such knowledge was laid down in *Galvan* v. *Press*, 347 U.S. 522. In short, the burden of proof, which was upon the Government, was not

met by evidence which was reasonable, substantial and probative.

In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party.* Quite different then is the situation in the instant case from that [fol. 6] in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications. This type of a balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to "crawl into." This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield,* 252 F. 2d 191, C.A. 6, February 14, 1958)

The respondent requests reopening of proceedings to offer testimony which he alleges will place him within the frame-

work of *Rowoldt*. The respondent has had since 1953 to present the facts but has failed to do so. Normally, reopening would be denied. However, we shall reopen proceedings because we believe it to be in the best interest of both the government and alien. If judicial review is sought in this case and the court declares that we are wrong in our evaluation of *Rowoldt*, the Service, if it has evidence bearing on the nature of the respondent's membership, will be required to bring new proceedings, and the respondent will be faced with the prospect of defending himself before the administrative authorities and perhaps again seeking judicial review. Government witnesses appear to be available. There was little development of the respondent's awareness of the fact that he belonged to a political organization. We have previously pointed out that there is some confusion in the testimony of Elorriaga. In view of all these factors, proceedings will be reopened and the respondent will be permitted to present such evidence as may be appropriate.

Order: It is ordered that the outstanding order of deportation be and the same is hereby withdrawn.

It Is Further Ordered that proceedings be reopened in accordance with the foregoing and for such further purposes as the special inquiry officer may find appropriate.

Thos. G. Finucane, Chairman

[fol. 7]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

Los Angeles 13, California

REOPENED HEARING—December 16, 1958

Deportation Proceedings

In the Matter of

JOSE MARIA GASTELUM-QUINONES

Also known as JOE GASTELUM, JOE VEGA

File A 5 176 004

Place of Hearing: Los Angeles, California

Persons Present:

Special Inquiry Officer: Louis L. Mattel

Examining Officer: Richard L. Lay

Stenographer: Caron Rhodes

Respondent's Counsel:
Maynard J. Omerberg, Attorney at Law, 1741 No. Ivar Ave., Hollywood 28, Calif.

Respondent: Jose Maria Gastelum-Quinones

Hearing conducted in the English Language.

Special Inquiry Officer: (Hereinafter designated as Inquiry Officer)

During 1956 the respondent, Jose Maria Gastelum-Quinones, also known as Joe Gastelum or Joe Vega, was accorded a hearing in deportation proceedings before me. On February 28, 1957, I entered my decision ordering that the respondent be deported on the charge contained in the

order to show cause, namely, that after entry he had been a member of a section, subsidiary, branch, affiliate or subdivision of the Communist Party of the United States.

Under date of November 14, 1957, the Board of Immigration Appeals ordered that the respondent's appeal be dismissed. By motion filed on January 13, 1958, respondent's counsel requested reconsideration on the basis of *Rowoldt* v. *Perfetto*, or that the respondent be granted an opportunity "to offer testimony to show that he in fact can place himself within the framework of the rule laid down in *Rowoldt*."

By decision dated May 12, 1958, the Board of Immigration Appeals directed that the outstanding order of deportation be withdrawn and that the proceedings be reopened. Upon due notice to the respondent and counsel, the reopened hearing has been set for today, December 16, 1958.

To Respondent:

Q. Do you understand and speak English?

A. I do.

Q. Are you the same Jose Maria Gastelum-Quinones who appeared before me for hearing during 1956 in deportation proceedings to which I previously referred?

A. I am.

[fol. 8] Q. What is your present home address, please?

A. 1800 Bridge Street, Los Angeles 33.

Q. Mr. Gastelum, are you still represented by Mr. William M. Samuels, or only by Mr. Omerberg, who is now present?

A. By Mr. Omerberg.

Q. Will you please stand and raise your right hand: Do you solemnly swear that the testimony you give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Inquiry Officer to Counsel: Mr. Omerberg, you may proceed.

Counsel: I have a statement, and that statement is going to constitute all of the respondent's presentation at this time. I was very surprised when the Board of Immigration

Appeals reopened this matter at what it says was respondent's request to offer testimony, having filed a memorandum which speaks for itself, and which is approximately a page and a half long, and which set forth the reasons why this matter should be reopened under *Rowoldt*, and then as a kind of logical afterthought in the last four lines said: "In any event respondent should be granted the right to offer testimony" if he wanted to, and the Board has construed this as a request to reopen for the opportunity of offering testimony.

My only point was that on a logical basis where neither the Government nor the respondent were aware of the *Rowoldt* requirements, because *Rowoldt* didn't exist at the time of the hearing, that it would be logical to reopen it for no other reason.

On behalf of the respondent I have reexamined the record and I am still satisfied that under *Rowoldt* respondent's deportation order should be set aside and that no further testimony is necessary. I would like to make a couple of comments in this respect. The Board in its decision said that the obvious and most striking difference between *Rowoldt* and the instant case is that in *Rowoldt* the sole information as to existence of membership came from the respondent, and they go on to say that in *Rowoldt* the respondent told why he had joined and how he had joined, and what the Board is doing is making out of the Supreme Court's language "meaningful political association", apparently making out of that language meaningful political joining, which is not what the Supreme Court said, and what the Board has done in this case is attempt to in the absence of an explanation for the joining assumed that there need be no evidence as to the nature of the association. [fol. 9] I submit that there is no evidence in this case as to the nature of the association, that the only difference between this record and the *Rowoldt* record in terms of what constitutes meaningful political association is that in *Rowoldt* there was a membership of some months, which I forget the exact number of, and here a record that shows at best approximately 18 months. There is no evidence of record of holding office or any kind of particular activity which could allow anyone to construe this as meaningful political association, and for those reasons respondent feels

that no prima facie case has been made out and therefore I feel that it is unnecessary to offer any further evidence.

Inquiry Officer to Counsel:

Q. Am I correct, then, Mr. Omerberg, that your statement just made for the record is the extent of the respondent's case and that no further documentary evidence or testimony by the respondent or any witnesses will be submitted at this time?

A. That is correct, with one qualification, and that is that it is assumed, of course, that all the records, statements, documents and evidence heretofore made a part of the record is also part of the record of this hearing.

Q. That is correct.

A. Otherwise that is correct. No witnesses will be offered, no testimony will be offered.

To Examining Officer:

Q. Mr. Lay, do you have any evidence or witnesses to present at this time?

A. Nothing.

Inquiry Officer: I will reserve decision in the respondent's case, and at such time as my decision is entered typewritten copies thereof will be served on respondent's counsel and on the Examining Officer.

Counsel: I would like to make one more comment, in view of what the Service has just indicated, and that is that it strikes me that in the number of years the Immigration Service has had this case and at least in the number of years since the original decision of the Board, that the logic which the Board of Immigration Appeals seeks to apply to respondent is equally applicable to the Immigration Service, and that is that if they had evidence which would show meaningful political association they certainly have no excuse for not presenting it at this time, and that it would behoove them to present it by this time, and the absence of such evidence would indicate that the most meaningful political association which could be shown to exist by the evidence in their possession has already been introduced.

Inquiry Officer: At the time that the copies of my decision are served upon respondent's counsel and the Examining Officer, all interested parties will be fully advised regarding all rights of appeal. There being nothing further, the hearing is closed.

I Certify that to the best of my knowledge and belief, the foregoing transcript is a true and correct report of everything that was stated during the course of the hearing, excluding statements made off the record.

Caron Rhodes, Stenographer.

Date transcript completed: December 17, 1958.

[fol. 10]

BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

DECISION—May 18, 1959

File: A5-176-004—Los Angeles

In re: Jose Maria Gastelum-Quinones

In Deportation Proceedings

Appeal

Oral Argument: February 4, 1959

On behalf of respondent:
David Rein, Esquire, 718 Sheraton Bldg., 711—14th St., N. W., Washington, D. C.

On behalf of I&N Service:
Irving A. Appleman, Esquire

Charges:

Order: Section 241(a)—I&N Act—After entry, member of a section, subsidiary, branch, affiliate or subdivision of the Communist Party of the United States.

Lodged: None

This is an appeal from the order of the special inquiry officer requiring respondent's deportation. The facts have been fully stated in previous orders. Briefly, respondent a 49-year-old male, a native and citizen of Mexico, has been a resident of the United States since 1920. On the basis of evidence introduced by the Service, he was found to have been a member of the Communist Party from late 1948 or early 1949 to at least the end of 1950. Respondent did not testify on a claim to privilege. The Board dismissed his appeal from the Special Inquiry Officer's order of deportation. Proceedings were ordered reopened by this Board after the respondent had filed a motion asking for reconsideration of the case in view of the decision in *Rowoldt* v. *Perfetto*, 355 U.S. 155, and stating that "In any event, respondent should be granted the right to offer testimony to show that he in fact can place himself within the framework" of *Rowoldt*. In considering the motion we pointed out that respondent did not fall within the rule in Rowoldt but we ordered reopening of proceedings to enable the respondent to present the testimony which he apparently desired to give and to enable the Service to present any additional evidence if it desired. Upon the reopened hearing, neither the respondent nor the Service offered any additional evidence. At oral argument counsel stated he [fol. 11] had no dispute with the Board's findings of the facts but did dispute the Board's application of law to the facts.

Both sides are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Thos. G. Finucane, Chairman

[fol. 12]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,429

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, Appellee.

Appeal from the United States District Court for the District of Columbia

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OPINION—Decided December 8, 1960

Mr. David Rein, with whom Mr. Joseph Forer was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee.

Before Edgerton,* Danaher and Bastian, Circuit Judges.

BASTIAN, Circuit Judge: This is an appeal from a judgment of the District Court dismissing appellant's [plain- [fol. 13] tiff's] complaint for review of an order of deportation issued by the Board of Immigration Appeals [Board]. The order complained of was issued pursuant to authority delegated to the Board by the Attorney General under § 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(6), which reads in pertinent part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

• • • • •

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* Judge Edgerton took no part in the consideration or decision of this case.

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

• • • • •

"(C) Aliens who are members of . . . the Communist Party of the United States . . ."

Appellant, a Mexican national, first entered the United States in 1920 and has resided here since that time. On February 28, 1957, a special inquiry officer of the United States Department of Justice, Immigration and Naturalization Service, after hearing on a rule to show cause issued March 23, 1956, found that, after his aforementioned entry into the United States, appellant was a voluntary member of at least two units of the Communist Party of the United States in Los Angeles, California. At the hearing, although voluntarily placed under oath, appellant, upon advice of counsel, invoked the Fifth Amendment and refused to testify. Appellant was accordingly ordered deported.

On November 14, 1957, the Board, to which appellant had appealed, ordered the appeal dismissed on the basis of the testimony before the special inquiry officer and his findings. The Board, in the appellate proceeding, stated that appellant was represented by able counsel, who was given the widest latitude in conducting his defense. Reviewing the testimony, the Board said:

"Counsel contends the record does not establish that respondent's membership was voluntary. The testi- [fol. 14] mony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, an attempt was made to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary."

We think the record amply supports this finding.

About one month later, on December 9, 1957, the Supreme Court rendered its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). On the basis of that decision and at appellant's request, the Board reopened the case so that, in the Board's words, "[appellant] will be permitted to present such evidence as may be appropriate [to place his case within the framework of Rowoldt]."

All that occurred at the reopened hearing before the special inquiry officer was that appellant's counsel made a statement to the effect that the evidence of record did not establish the "meaningful association" adverted to in *Rowoldt*, that a *prima facie* case did not exist and, therefore, that it was unnecessary to offer any further evidence. Accordingly, appellant again did not take the stand nor offer any evidence.

After the second and abortive hearing, the special inquiry officer filed his second opinion, calling attention to the fact that appellant had refused to testify during the original hearing, on a claim of privilege, and added:

> "Although the respondent's motion requested reopening of the proceedings to offer testimony which he alleged would place him within the framework of *Rowoldt*, and despite the fact that the Board of Immi- [fol. 15] gration Appeals granted the reopening for said purpose, the respondent failed to testify, to offer any documentary evidence, or to present any witnesses at the reopened hearing."

Calling attention to the fact that, despite the reopened hearing, the sum total of the evidence of record was exactly the same as it was when the decision of February 28, 1957, was entered and that the only new development was the Supreme Court's *Rowoldt* decision, the special inquiry officer proceeded to compare *Rowoldt* with the instant case, holding them to be clearly distinguishable, quoting from the decision of the Board in ordering reopening of the case as follows:

> "In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor

as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political part. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party.* Quite different then is the situation in the instant case from that in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Community Party may well have been wholly devoid of any political implications. This type of a balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a [fol. 16] political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to 'crawl into.' This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield,* 252 F.2d 191, C.A. 6, February 14, 1958)"

The special inquiry officer, therefore, reaffirmed his original findings of fact and conclusions of law and, there

being no request for discretionary relief, again ordered deportation. The appeal taken from that order was dismissed by the Board on May 18, 1959, the Board concluding its opinion as follows:

> "Both sides are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed."

Thereupon, appellant filed in the District Court his complaint for review of the deportation order, and for declaratory judgment and injunctive relief. On cross motions for summary judgment, the Board's motion for summary judgment was granted, that of appellant was denied, and the complaint was dismissed. This appeal followed.

Appellant's principal contention is that *Rowoldt* established a concept of "meaningful association" which requires the Government to show something more than mere membership in the Communist Party before a deportation order can validly be issued. In considering this contention, involving as it does the meaning of a recent Supreme Court decision, a brief study of the development of the present law will be helpful.

[fol. 17] It is well settled that an alien who is in the United States must be afforded procedural due process before he may be constitutionally deported. *Ng Fung Ho* v. *White*, 259 U.S. 276 (1921), *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1947). Under the Alien Registration Act of 1940, 54 Stat. 670, the pertinent ground for deportation was advocacy of the overthrow of the United States Government by force and violence. This ground was upheld as consistent with due process in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951). Under the Act of 1940 it was necessary in each deportation case involving membership in the Communist Party to prove that the individual advocated overthrow of the government by force and violence. The position of the Communist Party itself was immaterial.

The Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, dispensed with the need for proving, in each individual case, that the alien involved advocated overthrow

of the government by force and violence, and made Communist Party membership the test. The Supreme Court upheld this lessened burden of proof as constitutional in *Galvan* v. *Press*, 347 U.S. 522 (1954). In *Galvan* the Court placed great emphasis on a detailed legislative finding, contained in § 2(1) of the Act that:

> "[The] Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship . . . " At page 529.

The section here involved was then in effect in its present form. The Court held that the word "member" as used in 8 U.S.C. § 1251(a)(6)(C), the section involved here, was not limited to those "members" of the Communist Party who are fully cognizant of and who endorse the Party's advocacy of violence.

> [fol. 18] "It must be concluded . . . *that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization,* and that he did so of his own free will." [Emphasis supplied.] Galvan v. Press, *supra*, at page 528.

In *Galvan* the Supreme Court also mentioned that, "Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only . . . ," thus lending inferential support to the Government's view that the burden is on the alien to show that his Party membership was something other than bare organizational membership.

Under the 1940 Act, membership in the Communist Party was not a ground for deportation, but actual personal advocacy of the overthrow of the government by force and violence was. Under the present Act as inter-

preted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party.

It seems to us that the detailed legislative finding contained in § 2(1) of the 1950 Act and quoted *supra* makes the latter ground consistent with due process. The legislative finding merely states that the Communist Party as a political organization is devoted to the overthrow of the Government of the United States by force and violence, the ground upheld by *Harisiades v. Shaughnessy, supra.* The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legisla- [fol. 19] tive finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the "meaningful association" required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan.* Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.

Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party member-

ship was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand.

We add that the Board "did not draw any inference from the fact of appellant's silence that his testimony would have been adverse to him if given." Nor have we drawn an inference. Whether such an inference may be drawn we need not, under the circumstances of this case, determine. The judgment of the District Court is

Affirmed.

[fol. 20]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

DEPARTMENT OF JUSTICE

File No. A5 176 004

In the Matter of

JOSE MARIA GASTELUM-QUINONES, also known as JOE GASTELUM, also known as JOE VEGA

MOTION TO REOPEN AND RECONSIDER

Comes now the respondent in the above entitled matter and petitions for a reopening of the deportation hearing in this case in order that respondent may introduce evidence as indicated in his attached affidavit, which evidence (a) is relevant, material and crucial in the light of the decision in this case made by the United States Court of Appeals for the District of Columbia Circuit, but (b) was not offered at the hearing previously because neither the respondent nor the Service knew, or could reasonably be expected to know, that the evidence was admissible and material.

The respondent did not testify in the deportation hearing because he was acting on advice of counsel that such testimony was not required because the Service had failed to prove, by reasonable, substantial and probative evi-

dence, that petitioner's claimed membership in the Communist Party constituted a "meaningful association" in the light of *Rowoldt* v. *Perfetto*, 355 U.S. 115. Further- [fol. 21] more, counsel advised respondent that it would not be admissible or relevant testimony for him to testify that he personally never advocated or supported the overthrow of the government by force and violence and that he never knew that this was a tenet of the Communist Party. This latter advice of counsel was based on the Supreme Court's decisions in the *Rowoldt* case, *Galvan* v. *Press*, 347 U.S. 522, and *Harisiades* v. *Shaugnessy*, 342 U.S. 580. The advice was reasonable and was in accord with the understanding and practice of the Immigration Service and the Board of Immigration Appeals.

But in sustaining the order of deportation, the Court of Appeals held, contrary to counsel's advice and contrary to the theory on which the case was tried by the Immigration Service and affirmed by the Board of Immigration Appeals, that an important, and indeed crucial, issue in respondent's case was whether or not he did personally support or espouse advocacy of the overthrow of the government by force and violence. The Court further held that once membership in the Communist Party had been shown, the burden was on respondent to refute a presumption arising from such membership that he supported or espoused the tenet of violent overthrow. Thus the Court stated in its opinion, 286 F. 2d 824 at 828 (emphasis supplied):

> "*The present Act then applies to membership in the organization a presumption of espousal of the doctrine of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof* of membership in the Communist Party, (2) the legislative finding of the nature of the Party, *and (3) the presumption that a member of a political* organization [fol. 22] espouses the tenets of the organization.
>
> "In Rowoldt the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of

advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the 'meaningful association' required by the statute. We do not think that Rowoldt was in any sense a reversal or limitation of Galvan. *Rather, we think that Rowoldt amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.*

"Therefore we think that the statutory scheme which was upheld in Galvan was only explained and not reversed by Rowoldt and remains in effect. *Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation,* the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand."

The Supreme Court denied certiorari, thus letting the [fol. 23] decision of the Court of Appeals stand as the final judicial word and the law of the case.

The result is that respondent has been ordered deported because he failed to offer proof on an issue which he did not know, and could not reasonably be expected to know, was in the case. Furthermore, his lack of knowledge of this issue was shared, and contributed to, by the Board of Immigration Appeals, which even in remanding the case never hinted that this issue was relevant.

It is neither fair nor constitutional to deport petitioner for failing to prove something that neither he nor the Service knew was an issue in the case. The case should, therefore, be reopened to permit respondent to introduce evidence on this issue.

Attached hereto as Exhibit "A" is the affidavit of respondent to the latter effect, and which, in support thereof, he desires to testify.

Respondent has resided in the United States continuously for over forty years. He has been a law abiding, hard working, responsible resident. By his first wife who died in 1940 he had two children whom he raised to be decent, law abiding citizens of the United States, and by whom he has seven living citizen grandchildren with one more expected shortly. When he remarried in 1946 it was to a woman who at the time of the marriage had two children aged 14 and 11, whom he supported and raised as his own, by whom there have been six additional citizen children who regard the respondent as their grandfather. In fact, his stepson and the stepson's two children aged 5 and 2 presently reside with the respondent. Elementary justice should require that respondent not be penalized for relying on the good faith advice of counsel, and he should be allowed to testify to rebut the presumptions of espousal of the doc-
[fol. 24] trines of the Communist Party which a court has said clearly for the first time is not only material and relevant but his right so to do.

Respondent requests the opportunity for oral argument on this motion. The oral argument will be presented by respondent's Washington attorneys, Forer and Rein. Respondent also requests a stay of his deportation pending disposition of this motion.

Respectfully submitted,

Maynard J. Omerberg, Attorney for Respondent.

[fol. 25]

EXHIBIT A TO MOTION

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
FILE NO. A5 176 004

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION TO REOPEN AND RECONSIDER

In the Matter
of
JOSE MARIA GASTELUM-QUINONES

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JOSE MARIA GASTELUM-QUINONES, being first duly sworn, deposes and says:

1. I am the respondent in the above entitled action.

2. I have never advocated, supported or espoused, nor do I now advocate, support or espouse, the overthrow of the government of the United States by force and violence. On the contrary, it is and always has been my belief and desire that changes in our government and society should be accomplished by peaceable and constitutional means. Neither have I ever had any knowledge, understanding or belief that advocacy of the overthrow of the government of the United States by force and violence is a tenet of the Communist Party of the United States.

3. If the deportation hearing is reopened, I will testify to the facts stated in Paragraph 2.

4. I did not take the stand in the deportation hearing [fol. 26] previously, nor did I offer the testimony described

above, because I was advised by my attorney that (1) the Immigration Service had failed to carry its burden of proving that my alleged membership in the Communist Party was a meaningful association, and (2) evidence along the lines stated in Paragraph 2 hereof was not relevant nor admissible.

Dated this 1st day of May, 1961.

/s/ Jose Maria Gastelum-Quinones
Jose Maria Gastelum-Quinones

Subscribed and sworn to before me
this 1st day of May, 1961.

/s/ (Illegible)
Notary Public in and for the County
of Los Angeles, State of California.

[fol. 27]

Before the Board of Immigration Appeals

United States Department of Justice

Decision—August 1, 1961

File: A-5176004—Los Angeles

In re: Jose Maria Gastelum-Quinones aka Joe Gastelum aka Joe Vega

In Deportation Proceedings

Motion

Oral Argument: June 6, 1961

On behalf of respondent:
David Rein, Esquire, 711—14th Street, N. W., Washington, D. C.

Counsel of Record: Maynard J. Omerberg, Esquire, 1741 North Ivar Avenue, Hollywood 28, California (Did not appear.)

On behalf of I&N Service:
Irving A. Appleman, Esquire.

Deportable: Section 241(a), I&N Act (8 USC 1251(a))—
After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States.

Application: Motion for reopening of proceedings.

This is a motion for reopening of proceedings. It follows judicial review affirming the finding of deportability entered by this Board on May 18, 1959. The motion will be denied.

The respondent, a 41-year-old male, a native and citizen of Mexico, has been a resident of the United States since 1920. We found he was a member of the Communist Party from [fol. 28] about 1948 to at least the end of 1950. At the six deportation hearings held from April 1956 to July 1956, the respondent refused to testify on a claim of privilege. At a hearing reopened on his motion so that he could testify, the respondent offered no evidence on the ground that the Service had failed to make out a case. Reopening is now requested so that the respondent may testify that he did not advocate the overthrow of the Government by force and violence and that he had no knowledge that the Communist Party advocated the overthrow of the Government by force and violence. It is stated that such testimony was not offered previously because it was not known that it was admissible and material.

The Service opposes the motion contending that the respondent has had since 1953 to present the facts and has refused to avail himself of the many opportunities given including one which was granted to him at his request after deportation had been ordered, and that the offer of proof neither contests the existence of membership nor goes to the question of its meaningfulness. The Service, quoting *Jiminez* v. *Barber*, 252 F. 2d 550, C.A. 9, contends that the respondent must take the consequences of the course of defense which he pursued and points to the threat which is offered the deportation process if an alien who has been ordered deported and who has secured administrative and judicial review can upset deportation proceedings by assert-

ing his willingness to testify after having refused when he had an opportunity.

The respondent was ordered deported on the basis of his membership in the Communist Party under a statute whose scheme was explained in *Galvan* v. *Press*, 347 U.S. 522, where the Supreme Court which had been urged to construe the statute "as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence, and who, by so joining, thereby committed themselves to this violent purpose", ruled that the law " * * * appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program." The Supreme Court stated that " * * * it did not exempt 'innocent' members of the Communist Party." The conclusion of the Supreme Court was "that support, or even demonstrated knowledge of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will."

[fol. 29]

Shortly after the decision in the respondent's case, *Rowoldt* v. *Perfetto*, 355 U.S. 115, was decided. The Service had sought the deportation of Rowoldt who had been a member of the Communist Party for about a year in 1935. Uncontradicted evidence in the record revealed that Rowoldt joined at a time when he had no job and was concerned primarily with obtaining food, clothing and shelter. The Supreme Court held that under the facts presented, Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications and was therefore not "meaningful." After *Rowoldt* was decided, we received a motion from the respondent couched in similar terms to the present motion asking for reconsideration of the case (which we denied) and asking for " * * * the right to offer testimony to show that he in fact can place himself within the framework of the rule laid down in *Rowoldt*, which to his knowledge would have been

to no avail prior to the decision of the Supreme Court * * *." We reopened the proceedings to give the respondent an opportunity to bring himself within the framework of *Rowoldt*. At the reopened hearing, he offered no evidence and refused to testify claiming the Service had failed to make a case.

After the respondent was again found deportable by this Board, he filed a complaint for judicial review. The District Court dismissed the complaint. Appeal to the Circuit Court was dismissed on December 8, 1960 (*Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824, C.A. D.C.). This motion was filed almost five months later (May 4, 1961). It is the respondent's belief that the Court of Appeals in reviewing the administrative proceedings in his case ruled that meaningful association is equivalent to advocacy of the overthrow of the Government by force and violence; that the Court of Appeals believed that the respondent had been given an opportunity to testify with regard to his personal advocacy although the respondent did not have the opportunity for had he offered to testify on this point the special inquiry officer would have ruled it was not material under [fol. 30] *Galvan;* and that the respondent must now be given an opportunity to testify on the issue of belief in force and violence and the Party's advocacy of forceful overthrow.

It requires a far stretch of the imagination to interpret *Gastelum-Quinones* as modifying either *Galvan* or *Rowoldt* making deportation dependent upon proof that the alien or the Party advocated the forceful overthrow of the Government. The Circuit Court quoted language from *Galvan* setting forth the rule that personal advocacy of violence was not a prerequisite to deportation, and in its own words stated: "Under the present Act as interpreted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party." Bearing in mind that the Supreme Court rejected as a defense Galvan's claim that "he was unaware of the Party's true purposes and program" and bearing in mind the reaffirmation of *Galvan* by the

Supreme Court from time to time, it is our belief that an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or unconsciously in appearance only.

In *Gastelum-Quinones* the Circuit Court speaks of permitting an alien to rebut a presumption of the espousal of the basic tenets of the Communist Party which arises from the mere fact that the alien was a member of the Party. Because of the reliance placed by the Circuit Court upon *Galvan* and *Rowoldt*, and its own statement of the meaning of *Galvan*, we think that this language concerning the rebutting of the presumption means only that it is proper to show nominal membership as a defense; i.e., as in *Galvan*, membership that is involuntary, accidental, artificial, or unconsciously in appearance only; or as in *Rowoldt*, membership for the purpose of obtaining food and other necessities by one who presumably would just as well have joined the Salvation Army or one of the major political parties if he could thereby have obtained his necessities.

Counsel believes that *Scales* v. *United States*, 29 L. W. 4581, requires membership to be more than normal before it can be a ground of deportation. Counsel is of the belief that to be more than a normal member one must have devoted all [fol. 31] or a substantial part of his time and efforts to the Party. *Scales* involved the Smith Act under which to obtain a conviction it is necessary to show the existence of active and knowing membership held with the intent of furthering the proscribed purposes of the Party. This is unlike the deportation law which requires the establishment of only voluntary membership in an organization which the alien understood was the political organization known as the Communist Party. In *Scales*, the Supreme Court stated that it had interpreted deportation statutes as requiring "more than the mere voluntary listing of a person's name on Party rolls." *Galvan* is cited as authority. To us the statement in *Scales* indicates no more than the fact that a person who has been a member is not precluded from explaining that his membership was artificial. In the instant

case, there is uncontradicted testimony to show that a voluntary meaningful membership existed.

The respondent has been given an opportunity to show that his membership was nominal. He refused to present evidence on this issue. There is no reason to believe that his membership was nominal. Execution of the deportation order entered upon the administrative proceedings started in March 1956 should not encounter further delay.

Order: It is ordered that the motion be and the same is hereby denied.

/s/ Thos. G. Finucane,
Chairman.

[fol. 32] [File endorsement omitted]

In United States District Court
For the District of Columbia
Civil Action No. 2565-61

Jose Maria Gastelum-Quinones, 1800 Bridge Street, Los Angeles, California, Plaintiff,

v.

Robert F. Kennedy, Attorney General of the United States, Department of Justice, Washington, D. C., Defendant.

Complaint for Review of Deportation Order and for Declaratory Judgment and Injunctive Relief—Filed August 7, 1961

The plaintiff, Jose Maria Gastelum-Quinones, complaining of the defendant, alleges:

1. The Court has jurisdiction of this action under D. C. Code, sections 11-305 and 11-306; 28 U. S. Code, section 2201; and section 10 of the Administrative Procedure Act. 5 U. S. Code, section 1009.

2. The plaintiff is a native and citizen of Mexico. He was admitted to the United States for permanent residence in October 1920, and since then has continuously resided, and now resides, in the United States.

3. The defendant, Robert F. Kennedy, is the Attorney General of the United States. He is in charge of the administration of the statutes of the United States relating to the deportation of certain classes of aliens. His principal office is, and he may be found, in the District of Columbia.

4. Following administrative proceedings which exhausted his administrative remedies, plaintiff was ordered deported by the Attorney General under section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, section 1251(a)(6)(C), on a finding that plaintiff had been a member of the Communist Party of the United States from 1948 or 1949 to the end of 1950.

[fol. 33] 5. Plaintiff thereupon filed suit against the Attorney General in this Court (Gastelum-Quinones v. Rogers, Civil Action No. 1421-59) to review and enjoin the deportation order, alleging that the order was illegal. This Court granted judgment for the defendant on September 25, 1959. On December 8, 1960, the United States Court of Appeals for the District of Columbia Circuit affirmed said judgment (No. 15,429; 286 F. 2d 824), and denied a petition for rehearing on January 9, 1961. On April 3, 1961, the Supreme Court of the United States denied a petition for a writ of certiorari, Mr. Justice Douglas dissenting. On May 8, 1961, the Supreme Court denied a petition for rehearing.

6. Plaintiff's principal contention in the Court of Appeals was that the government had failed to carry its burden of proving that the Communist Party membership attributed to plaintiff constituted a "meaningful association" in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and hence that such membership was not a cause for deportation.

7. The Court of Appeals held, in its aforesaid decision, that:

(a) The deportation statute applies to members of the Communist Party a presumption that they personally espouse the Party's basic tenets of advocacy of the overthrow of the government by force and violence, and it is this personal attitude which warrants deportation.

(b) The *Rowoldt* decision made this presumption rebuttable by the alien. The Court of Appeals held: "Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership."

(c) In the deportation case against plaintiff, the government had made a prima facie case of deportability merely by proving that plaintiff had once been a voluntary member of the Communist Party. Since plaintiff had not offered evidence in the deportation case, having taken the position that the burden of proof was on the government to prove that the membership was a "meaningful association," plaintiff had failed to rebut the statutory presumption that he [fol. 34] had personally espoused advocacy of violent overthrow. Hence the order of deportation was sustained.

8. Prior to the decision of the Court of Appeals, neither plaintiff, his counsel nor the Immigration and Naturalization Service knew, or could have been expected to know, that an alien who had been a member of the Communist Party could successfully defend against deportation by proving that despite his membership he had not personally espoused advocacy of violent overthrow of the government. On the contrary, plaintiff, his counsel and the Immigration and Naturalization Service believed, and had reasonable grounds to believe, that such proof would not constitute a defense.

9. On May 4, 1961, plaintiff filed with the Board of Immigration Appeals a motion that the deportation proceedings be reopened in order to permit plaintiff to introduce evi-

dence that he had never advocated, supported or espoused the overthrow of the government of the United States by force and violence and had never had any knowledge or belief that such advocacy is a tenet of the Communist Party of the United States. The motion was supported by affidavits of plaintiff and his counsel to the effect that if the proceeding were reopened plaintiff would testify as indicated in the preceding sentence; and that he had not testified to that effect in the preceding deportation hearings only because he had relied on the reasonable advice of his counsel that such testimony was not, under the law as it then existed, relevant and material and that it would not be admitted at the hearing.

10. The Board of Immigration Appeals granted oral argument on the motion to reopen. On August 1, 1961, the Board issued a decision and opinion ruling that the evidence proffered by plaintiff was not material and denying the motion.

11. The denial of the motion to reopen was and is erroneous, unconstitutional and illegal in the following respects:

(a) The evidence proffered was relevant, material, and in fact crucial under the decision of the Court of Appeals [fol. 35] in plaintiff's case. The holding of the Board of Immigration Appeals to the contrary is erroneous and violates the law of plaintiff's case established by the decision of the Court of Appeals.

(b) The erroneous legal theory of the Board of Immigration Appeals resulted in an erroneous and illegal refusal of the Board to exercise its discretion to reopen the deportation proceeding. If the Board in fact exercised its discretion, it did so arbitrarily and capriciously.

(c) The denial of the motion violates due process of law since it will, unless prevented by this Court, cause plaintiff to be deported without his having had a reasonable and fair opportunity to introduce relevant and material evidence in the deportation proceeding and to present a valid and meritorious defense therein.

(d) The deportation statute as construed and applied by the defendant and his agents is unconstitutional, being violative of due process, the First Amendment, and the prohibitions against bills of attainder and ex post facto laws.

12. Unless enjoined by the Court, the defendant will take plaintiff into custody and deport him. Such action will be illegal and unconstitutional because of the illegal and unconstitutional denial of plaintiff's motion to reopen the deportation proceeding.

13. By the aforesaid actions and threatened actions of the defendant, the plaintiff is threatened with imminent and irreparable injury for which he has no adequate remedy at law.

14. Plaintiff has exhausted his administrative remedies.

15. Plaintiff is presently at large on administrative bond He is not a security risk, is not engaged in, is not likely to engage in, and has no intention of engaging in, activities detrimental to the safety or interests of the United States.

Wherefore, plaintiff demands judgment (1) declaring that the refusal to reopen the deportation proceeding is invalid and that plaintiff may not lawfully be deported [fol. 36] under the outstanding deportation order; (2) enjoining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, from deporting plaintiff, requiring him to surrender to deportation, taking or holding him in custody under or in connection with the deportation order, or otherwise enforcing or giving effect to such deportation order; (3) granting such other and further relief as may be appropriate. Plaintiff also prays for a preliminary injunction enjoining the defendant as aforesaid pending the trial and disposition of this cause, and for an appropriate temporary restraining order.

Joseph Forer, David Rein, 711 14th St. N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 37] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

MOTION FOR PRELIMINARY INJUNCTION—
Filed August 7, 1961

The plaintiff, by his attorneys, moves for a preliminary injunction enjoining and restraining the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, pending the final disposition of this action, from deporting or attempting to deport plaintiff, requiring him to surrender for deportation, or taking him into custody under or in connection with the deportation order against him.

The grounds for this motion are that unless so restrained the defendant will take plaintiff into custody and deport him before this cause can be determined, thereby causing plaintiff irreparable injury.

In support of this motion, plaintiff refers to the complaint, the annexed affidavit of Joseph Forer, and such further supporting affidavits as may subsequently be filed herein.

Joseph Forer, David Rein, Attorneys for Plaintiff.

[Handwritten notation—Aug. 9, 1961, Motion for Preliminary Injunction set for 1:45 P.M. Aug. 10, 1961, Leonard P. Walsh]

[fol. 38] [File endorsement omitted]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 7, 1961

A preliminary injunction should be granted to prevent the irreparable injuries of deportation or being taken into custody for deportation.

Rubinstein v. Brownell, 92 U.S. App. D.C. 328, 206 F. 2d 442.

Lim Fong v. Brownell, 215 F. 2d 683 (App. D.C.).

Joseph Forer, David Rein, Attorneys for Plaintiff.

[fol. 39] [File endorsement omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 7, 1961

District of Columbia, ss:

DAVID REIN, being duly sworn, deposes and says:

1. I represented plaintiff in the deportation proceedings against him and in the prior litigation involving the deportation order. The deportation order against plaintiff has become administratively final, and all administrative remedies have been exhausted. On August 1, 1961, the Board of Immigration Appeals denied the motion to reopen described in paragraph 9 of the complaint.

2. On information and belief, plaintiff is not a security risk, is not engaged in or likely to engage in activities detrimental to the safety of the United States, is of good character, and has a reputation for good character.

3. The record in the prior litigation shows that plaintiff entered the United States for permanent residence in 1920 at the age of 10; that he has resided in the United States continuously since that date; that he is married and supports his wife; that he has two children born in the United States; and, as of May 26, 1959, five grandchildren born in the United States. That record also contains an affidavit from the plaintiff, executed on May 26, 1959, that he is not a

member of the Communist Party or of any organization [illegible] that to his knowledge or belief advocates violent overthrow of the government; that he is not engaged in and has no intention of engaging in activities inimical to the safety or interests of the United States; that during the deportation proceeding, he was enlarged on administrative bond. Because plaintiff lives in California, there has not been time, as of the execution of this affidavit, to obtain from him an up-to-date affidavit on these matters.

DAVID REIN.

Subscribed and sworn to before me this 7th day of August, 1961.

Mary E. Rosenthal, Notary Public. My Commission Expires August 31, 1964.

[fol. 41] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed August 9, 1961

State of California,
County of Los Angeles, ss:

JOSE MARIA GASTELUM-QUINONES, being first duly sworn, deposes and says:

1. I am the plaintiff in the above action.

2. I have resided in the United States since October 1920, when I entered this country at the age of ten. I am married and support my wife. I have twin children, age 26, who were born in the United States and are residents and citizens of the United States. I have eight grandchildren who were born in the United States and are residents and citizens of the United States. My occupation is a counter-man in a restaurant.

3. I am not a member of the Communist Party or of any organization that to my knowledge or belief advocates violent overthrow of the United States government, nor do I personally so advocate. I am not engaged in, and have no intention of engaging in, activities inimical to the safety or security of the United States. During the deportation proceedings I was enlarged on administrative bond.

Jose Maria Gastelum, known in these proceedings as Jose Gastelum-Quinones.

Subscribed and sworn to before me this 5th day of August, 1961.

Delfino Varela, Notary Public in and for the County of Los Angeles, State of California.

Delfino Varela, Notary Public, State of California—Principal Office, Los Angeles County. My Commission Expires May 5, 1963, 2411 Brooklyn Ave., Los Angeles 33, Calif.

[fol. 42] Certificate of Service (omitted in printing).

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565-61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

August 14, 1961

The parties having stipulated that plaintiff's motion for temporary restraining order be treated as and joined with his motion for preliminary injunction; this cause having come before the Court for hearing on the application for injunctive relief *pendente lite*; the Court, having considered the record, heard counsel, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

Plaintiff is an alien, a native and citizen of Mexico, who entered the United States in 1920.

II

During the period April-July 1956, plaintiff was accorded a deportation hearing. The deportation charge was that he had been, after entry, a member of the Communist Party in the United States. Plaintiff refused to testify at the hearing. Two Government witnesses testified to plaintiff's membership in the Communist Party. A Special Inquiry Officer found plaintiff deportable as charged.

III

On November 14, 1957 the Board of Immigration Appeals entered its original deportation order on its review of plaintiff's case. Based on the testimony of the two Government witnesses, the Board found: Plaintiff was a member of the Communist Party from late 1948 or early 1949 to at least the end of 1950. For several months an attempt [fol. 44] was made to make plaintiff a leading figure in a Communist Party unit. He paid dues over the period of his membership. And he attended many Party meetings closed to all but members of the Communist Party. Accordingly, the Board concluded that the Government's evidence had established plaintiff's voluntary membership in the Communist Party.

IV

After the Supreme Court had decided *Rowoldt* v. *Perfetto*, 355 U.S. 115, on December 9, 1957, plaintiff on January 13, 1958 moved the Board of Immigration Appeals for reconsideration of the Order of Deportation in light of the *Rowoldt* decision, or for reopening of the deportation proceedings "to enable the respondent [plaintiff] to offer testimony to show he can place himself within the framework of the rule laid down in *Rowoldt*."

V

The Board of Immigration Appeals by an order dated May 12, 1958—although concluding that the evidence established plaintiff's Communist Party membership to have been a "meaningful association" within the meaning of the *Rowoldt* decision—ordered the deportation proceedings reopened to enable plaintiff "to present such evidence as may be appropriate."

VI

At a reopened hearing held before a Special Inquiry Officer on December 16, 1958, plaintiff chose not to testify or offer evidence in any other form. Nor did he advance any claim that his proved membership in and other sup-

port of the Communist Party had been innocent of any meaningful political implications. Instead, he chose to offer merely a statement by his counsel that the existing record did not establish a "meaningful association" within the meaning of the *Rowoldt* decision.

VII

The Board of Immigration Appeals entered its final order in plaintiff's case on May 18, 1959. The Board noted that, although the proceedings had been reopened to enable plaintiff to present testimony, he had not offered any evidence. The Board concluded that the deportation hearing record established plaintiff's Communist Party membership to have been a "meaningful membership." The Board dismissed the appeal. And the Order of Deportation then became administratively final.

[fol. 45]

VIII

On May 22, 1959 plaintiff brought an action (Civil No. 1421-59) in this Court for judicial review of the final Order of Deportation. This Court on September 21, 1959 granted the Government's motion for summary judgment. Plaintiff appealed this Court's adverse decision to the Court of Appeals for the District of Columbia Circuit (No. 15,429).

IX

The Court of Appeals affirmed, by decision dated December 8, 1960, reported at 286 F.2d 824. The Court of Appeals held that the record sustained the finding of the Board of Immigration Appeals that plaintiff's Communist Party membership was meaningful. In reaching this conclusion, the Court of Appeals concluded that under the *Rowoldt* decision, once the Government has made out a *prima facie* case by proving voluntary membership, the burden comes to be on the alien to come forward with an explanation.

X

Plaintiff petitioned the Supreme Court for a Writ of Certiorari to review the Court of Appeals' decision. No.

711, October Term 1960. Certiorari was denied on April 3, 1961, reported 29 LW 3292. Rehearing was denied on May 2, 1961, reported at 29 LW 3335.

XI

Plaintiff then on May 4, 1961 moved the Board of Immigration Appeals to reopen the deportation proceedings. He sought this further reopening of the deportation proceedings, so that he might now testify that he did not advocate the overthrow of the Government by force and violence, and that he had no knowledge that the Communist Party advocated the overthrow of the Government by force and violence. He claimed that such testimony had not been offered previously because he had not known it was admissible and material. And he contended that the Court of Appeals had ruled in its decision in his case that meaningful association with the Communist Party is equivalent to advocacy of the overthrow of the Government by force and violence.

XII

The Board of Immigration Appeals in an order dated August 1, 1961 denied plaintiff's motion for reopening of [fol. 46] the deportation proceedings. The Board ruled: (A) That the Court of Appeals' decision in plaintiff's case is not to be construed as modifying the Supreme Court decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115, or the earlier Supreme Court decision in *Galvan* v. *Press*, 347 U.S. 522 which the *Rowoldt* decision amplified, so as to make deportation dependent upon proof that the alien or the Communist Party advocated the forcible overthrow of the Government of the United States; and (B) That such decision means that the alien must at least make a showing by his explanation or otherwise that his membership in the Communist Party was accidental, artificial, or unconsciously in appearance only, or was for the purpose of obtaining food or other necessities. The Board further ruled as follows:

> . . . In the instant case, there is uncontradicted testimony to show that a voluntary, meaningful membership existed.

The respondent [plaintiff] has been given an opportunity to show that his membership was nominal. He refused to present evidence on this issue. There is no reason to believe that his membership was nominal. Execution of the deportation order entered upon the administrative proceedings started in March 1956 should not encounter further delay.

Conclusions of Law

I

The issues plaintiff raises are unsubstantial. It is wholly improbable that he would prevail on the ultimate merits.

II

There is no error in the Board of Immigration Appeals' rulings that the Court of Appeals' decision in plaintiff's case does not purport to modify the Supreme Court decisions in *Rowoldt* v. *Perfetto* and *Galvan* v. *Press*, *supra*, so as to make deportation dependent upon proof that the alien or the Communist Party advocated the forcible overthrow of the Government of the United States; and that the said decision means that the alien must at least make some showing that his membership in the Communist Party was accidental, artificial, or unconsciously in appearance only, or was for the purpose of obtaining food or other necessities.

[fol. 47]

III

The Board of Immigration Appeals clearly did not abuse its discretion in declining to reopen the deportation proceedings at this time, upon consideration of the following factors: (1) The uncontradicted evidence in plaintiff's case shows that his established association with the Communist Party was a voluntary, meaningful membership; (2) There is no reason to believe—even crediting the testimony he now desires to offer—that his was not a voluntary, meaningful membership in the Communist Party; and (3) Plaintiff's case has already been litigated over a five-year period—from 1956 to 1961—both administratively and on judicial

review in the courts, during which period the plaintiff in 1958 declined to avail himself of the opportunity given him by the reopening of the deportation hearing specifically on his request to be permitted to testify on the issue of meaningful membership in the Communist Party. (See *Rystad* v. *Boyd*, 246 F.2d 246, 248-249 (9th Cir. 1957), *cert. den.* 355 U.S. 912, *reh. den.* 355 U.S. 967 (1958); *Jimenez* v. *Barber*, 252 F.2d 550, 553-554 (9th Cir.), *appl. for stay of deportation denied upon reference to the entire Court* 355 U.S. 943 (1958).)

IV

The deportation of plaintiff on the present record is constitutional and fully in accord with law. Accordingly, plaintiff will suffer no legal injury whatever if he is deported under the outstanding Order of Deportation.

V

Under all of the circumstances of this case, the process of this Court should not be permitted to be utilized so as to occasion further delay in plaintiff's proper deportation pursuant to law.

VI

Consequently, this Court is warranted, both upon the determination that as a matter of law plaintiff will suffer no legal injury, and in the proper exercise of a sound judicial discretion, to deny plaintiff's motion for preliminary injunction.

Counsel for defendant is directed to submit an appropriate order in accordance herewith.

Leonard P. Walsh, United States District Judge.

Dated: August 14th, 1961

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

C. A. No. 2565—61

JOSE MARIA GASTELIUM-QUINONES, Plaintiff,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION—August 14, 1961

Upon the basis of the Findings of Fact and Conclusions of Law herewith entered in this cause, it is this 14th day of August, 1961,

Ordered, that the Plaintiff's motion for preliminary injunction be, and the same is hereby, denied.

It Is Further Ordered, that execution of this Order be, and the same is hereby stayed until 4 o'clock P. M., August 18, 1961.

Leonard P. Walsh, Judge.

Forer & Rein, 711—14th St., N. W., Attorneys for Plaintiff.

Hon. David G. Acheson, United States Attorney, Attorney for the Defendant.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,552—September Term, 1961
District Court Civil Action 2565—61

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Danaher and Bastian, Circuit Judges, in Chambers.

ORDER DENYING A STAY AND AFFIRMING THE JUDGMENT OF THE DISTRICT COURT—Dated September 13, 1961

Upon consideration of appellant's motion for stay of deportation pending appeal and of appellee's opposition and of appellee's motion to affirm the judgment of the District Court, of appellant's opposition and of appellee's reply, it is

Ordered by the court that the motion for stay of deportation is denied and that the judgment of the District Court appealed from herein is affirmed.

Per Curiam.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565—61

JOSE MARIA GASTELUM QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT—Filed October 13, 1961

Comes now defendant by his attorney, the United States Attorney, and moves to dismiss or, in the alternative, for summary judgment on the grounds that the complaint fails to state a claim upon which relief can be granted and that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Attached hereto and made a part hereof is the certified record of proceedings of the Immigration and Naturalization Service pertaining to plaintiff, identified as Defendant's Exhibit No. 1.

David C. Acheson, United States Attorney; Charles T. Duncan, Principal Assistant United States Attorney; Joseph M. Hannon, Assistant United States Attorney; Harold D. Rhynedance, Jr., Assistant United States Attorney.

[fol. 51] Certificate of Service (omitted in printing).

[fol. 52] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 2565—61

JOSE MARIA GASTELUM-QUINONES, Plaintiff,

v.

ROBERT F. KENNEDY, Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, DISMISSING THE COMPLAINT, ETC.—October 25, 1961

Upon consideration of defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment and plaintiff's opposition thereto, and the Court having considered the complaint and exhibit of record, and after hearing oral argument on behalf of the respective parties in open Court, and the Court having determined that there is no genuine issue of material fact, it is by the Court on this 25 day of October, 1961,

Ordered that the defendant's Motion For Summary Judgment be and the same is hereby granted and the complaint be and the same is hereby dismissed, and it is

Further Ordered that defendant's alternative Motion To Dismiss be and the same is hereby denied as moot.

Alexander Holtzoff, United States District Judge.

[fol. 53] Certificate of Service (omitted in printing).

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,747—September Term, 1961

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Fahy, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER TRANSFERRING CASE TO ANOTHER DIVISION OF COURT—February 21, 1962

Upon consideration of appellee's motion to affirm and of appellant's opposition, it is

Ordered by the court that the motion to affirm is referred to the division of this court which heard and decided *Gastelum-Quinones* v. *Rogers*, 109 U.S. App. D.C. 267, 286 F.2d 824.

Per Curiam.

[fol. 55] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 16,747—September Term, 1961
District Court Civil Action 2565—61

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Appellee.

Before: Edgerton, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER AFFIRMING JUDGMENT OF THE DISTRICT COURT—February 23, 1962

Upon consideration of appellee's motion to affirm and of appellant's opposition, it is

Ordered by the Court that the judgment of the District Court appealed from in this case is affirmed.

Per Curiam.

Circuit Judge Edgerton took no part in consideration of the above motion.

[fol. 56] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,747

JOSE MARIA GASTELUM-QUINONES, Appellant,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING BY COURT EN BANC—
Filed March 9, 1962

Appellant petitions for a rehearing before the Court *en banc*.

This appeal involves judicial review of a refusal of the Board of Immigration Appeals to reopen a deportation case against appellant for the purpose of receiving additional evidence.

[fol. 57] The deportation order was upheld by this Court in *Gastelum-Quinones* v. *Rogers*, 109 App. D. C. 267, 286 F. 2d 824. The panel consisted of Judges Edgerton, Danaher and Bastian, but Judge Edgerton did not participate in the decision.

Under the decision, the crucial factor in the affirmance of the deportation order was the failure of appellant to introduce evidence to rebut a presumption held to arise from past membership in the Communist Party) that he personally espoused doctrines of violence.

Appellant then moved the Board of Immigration Appeals to reopen the deportation proceeding in order to allow him

to introduce evidence negating any such espousal on his part. As the motion alleged, appellant had never had a chance to present this evidence before, because both he and the immigration authorities had believed, in the light of relevant Supreme Court decisions, that such evidence was irrelevant. The Board denied the motion on the ground that the evidence was indeed irrelevant.

Petitioner then brought the suit which is here involved. The District Court denied a motion for preliminary injunction. Appellant appealed, and on motion of appellee the judgment was affirmed by this Court without opinion. The affirmance was again by only two judges, Judges Danaher and Bastian.*

Thereafter the District Court granted summary judgment for appellee. Appellant duly entered an appeal, filed the record in this Court, and filed his brief. Appellee then filed a motion to affirm the judgment below. A panel consisting of Judges Fahy, Danaher and Bastian, to whom this appeal had presumably been assigned, thereupon entered an order *sua sponte* transferring the case to the same panel [fol. 58] which had heard the previous appeals. That panel then entered an order affirming the judgment below without argument and without opinion. Again Judge Edgerton did not participate.

Thus each of appellant's three appeals has been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate.

Although we appreciate that two judges constitute a quorum of a panel, the unusual situation which has arisen here seems inconsistent with the spirit of 28 U. S. Code, sec. 46. For this reason we believe that the case should be reheard *en banc*, as the only practicable method by which appellant can have the benefit of consideration by more than two judges. Our briefs in the original appeal and

* By order of Chief Justice Warren, appellant's deportation has been stayed pending Supreme Court disposition of a petition for certiorari from the judgment affirming the denial of a preliminary injunction.

in this appeal set forth the grounds on which we believe that (1) the initial decision was erroneous and based on a mistaken analysis of the applicable statutes and Supreme Court decisions, and (2) that if the initial decision is to be adhered to, then by its reasoning petitioner was entitled to have his deportation case reopened.

Respectfully submitted,

David Rein, Joseph Forer, Attorneys for Appellant.

Certificate

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

David Rein

[fol. 59] [File endorsement omitted]

In United States Court of Appeals
For the District of Columbia Circuit
No. 16,747—September Term, 1961

Jose Maria Gastelum-Quinones, Appellant,

v.

Robert F. Kennedy, Attorney General of the United States, Appellee.

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Bazelon, Fahy, Washington, Danaher, Bastian, Burger, and Wright, Circuit Judges, in Chambers.

Order Denying Petition for Rehearing, En Banc—
May 7, 1962

Upon consideration of appellant's petition for rehearing en banc, it is

Ordered by the court that the petition for a rehearing en banc be, and it is hereby, denied.

Per Curiam.

[fol. 60]

BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE

Los Angeles 13, California

HEARING OF APRIL 13, 1956

By Special Inquiry Officer:

Hearing in Deportation Proceedings

Place of Hearing: Los Angeles, California

File A5 176 004

In the case of

JOSE MARIA GASTELUM-QUINONES
aka JOE GASTELEM aka JOE VEGA

Persons Present:

Louis L. Mattel—
Special Inquiry Officer

William S. Howell—
Examining Officer

William Samuels—
Attorney at Law, Respondent's counsel, 2334 Brooklyn Avenue, Los Angeles 33, California.

Jose Maria Gastelum-Quinones—
Respondent

Conducted in the English language
and recorded by dictaphone:

• • • • • • •

[fol. 61] By Special Inquiry Officer:

Q. Mr. Gastelum, for clarification of the record when you answer questions and state that you refuse to answer on the previous grounds stated, do you want it understood that you are refusing to answer on the basis of the 5th Amendment to the Constitution?

A. That is correct.

You may proceed, Mr. Howell.

• • • • • • •

[fol. 62] By Special Inquiry Officer to Respondent:

Q. Mr. Gastelum, you are advised that you are still under oath. Do you understand?

A. Yes I do.

Special Inquiry Officer to Examining Officer: You may continue, Mr. Howell.

Examining Officer to Respondent:

Q. Mr. Gastelum, have you at any time been a member of the Communist Party of the United States?

By Counsel: Same objections I interposed to Mr. Howell's previous questions.

By Special Inquiry Officer: Objection overruled.

By Counsel: I advise my client.

63] By Respondent:

A. I refuse to answer the question on the basis of my previous reasons.

Examining Officer to Respondent:

Q. Have you at any time been a member of a section of the Communist Party of the United States?

By Counsel: Same objection and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the same basis as previously stated.

Examining Officer to Respondent:

Q. Have you at any time or are you now a member of any branch of the Communist Party of the United States?

By Counsel: Same objections and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis previously stated.

Examining Officer to Respondent:

Q. Are you now or have you ever been a member of any affiliate of the Communist Party of the United States?

By Counsel: Same objections and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis of my previous statement.

[fol. 64] Examining Officer to Respondent:

Q. Are you now or have you ever been a member of any subdivision of the Communist Party of the United States?

By Counsel: Same objection and same advice to my client.

By Special Inquiry Officer: Objection overruled.

By Respondent:

A. I refuse to answer the question on the basis of my previous statement.

By Examining Officer: At this time I desire to call a witness.

By Special Inquiry Officer: Permission granted.

Let the record show that a witness has been called.

• • • • • • •

[fol. 65]

EXCERPTS FROM TRANSCRIPT OF THE DEPORTATION HEARING ACCORDED APPELLANT BY THE IMMIGRATION AND NATURALIZATION SERVICE—May 7, 1956

Testimony of Witness DANIEL SCARLETTO

Special Inquiry Officer to Witness:

• • • • • • •

Q. What is your full name, please?

A. Daniel Scarletto.

• • • • • • •

Direct examination.

Examining Officer to Witness:

* * * * * * *

Q. Were you at one time previously to now, a member of the Communist Party of the United States?

A. Yes.

Q. When did you join the Communist Party of the United States?

A. It was in '47.

Q. In what city were you residing when you joined the Communist Party?

A. Los Angeles.

Q. How did you happen to join the Communist Party in 1947?

A. I was at that time; at that time I joined the Communist Party under the supervision of the F.B.I.

Q. How long did you continue your membership in the Communist Party?

A. Until '52; the Smith Act trials we had here.

Q. Were you a member continuously from 1947 until 1952?

A. Yes.

Q. Did you pay dues into the Communist Party?

A. Yes.

[fol. 66] Q. When, you first joined the Communist Party, were you assigned to any Unit or Section or Subdivision of that Party?

A. The first time I joined, I was assigned to a school, a beginner's class, I think it was called.

Q. For how long a period did this class continue?

A. It went on for several weeks; I can't recall just how long it was; it went on for several weeks.

Q. How often did it meet?

A. Two nights a week.

Q. In what city was this school conducted?

A. In El Sereno, Los Angeles.

Q. El Sereno; is that a district within the City of Los Angeles?

A. Yes.

Q. After this school was terminated, were you then assigned to any Unit or Section of the Communist Party?

A. Yes, I was in the El Sereno Club; the Communist Party Club.

Q. How many members would there have been in the El Sereno Club, approximately?

A. There was approximately 32 members in the El Sereno Club at that time.

Q. To your knowledge, was that the smallest unit of the Communist Party or were there any smaller divisions to your knowledge at that time?

A. That was one of the large divisions which was split up later.

Q. Do you recall when it was that you were assigned to the El Sereno Club?

A. I don't recall just the date that I went into the El Sereno Club, but it must have been early '49, at least.

[fol. 67] Q. Was the El Sereno Club a unit of the Communist Party of the United States?

A. Yes.

Q. Do you recall how long you continued membership in the El Sereno Club?

A. It was only a matter of a few months I was in the El Sereno Club.

Q. Were you then assigned to another unit?

A. Yes.

Q. What was the designation of this other unit to which you were then assigned?

A. The El Sereno Club was split up into smaller units for security reasons, and I was put into the Mexican Concentration Club.

Q. Do you recall what year this took place now?

A. That was in early '49, in the year '49.

Q. Was this Mexican Concentration Club a unit of the Communist Party of the United States, to your knowledge?

A. Yes.

Q. Getting back to the El Sereno Club, do you recall how often that unit met?

A. Yes, the executives met once a week and the whole club would meet once a week.

Q. Did you hold any official position in the El Sereno Club?

A. Yes, I was press director in the El Sereno Club.

Q. As press director, did you meet with the executive group of that club?

A. Yes.

Q. Were there any restrictions upon who could attend the meetings of the regular membership of the El Sereno Club?

A. Yes.

Q. What were those restrictions?

A. Only Commie members were allowed.

Q. By Commie, do you mean members of the Communist Party?

A. Yes.

Q. Referring to the Mexican Concentration Club, were regular meetings of that unit held?

A. Yes.

[fol. 68] Q. How often?

A. One day a week the executives would meet, and then one day a week the club would meet.

Q. Did you hold any office in the Mexican Concentration Club?

A. Yes.

Q. What office did you hold in that club?

A. I was organization secretary.

Q. As organization secretary, what were your duties?

A. My duties was finance, collecting of dues, and sustainers, and handling political literature and taking over duties of the chairman in case the chairman was ever absent.

Q. How long were you a member of the Mexican Concentration Club?

A. I was in the Mexican Concentration Club until the year, '51, and then I was transferred into the Communist underground.

Q. You said this club met on the average of once a week; did you attend most of the meetings of that club?

A. Yes.

Q. Was attendance at these meetings restricted in any way?

A. Yes.

Q. In what way was the attendance of the Mexican Concentration Club restricted?

A. To Communist Party members.

Q. Do you recall what safeguards were taken to make certain that only Communist Party members attended these meetings?

A. Well, we knew each other and no one else was ever attempting to attend that was not a Communist member.

Q. Did you know all of the members personally, yourself?

A. Yes.

Q. Did you know all of them to be members of the Mexican Concentration Club?

A. Yes.

Q. Were these meetings of the Mexican Concentration Club held in any hall, or particularly designated place; did they have a club room?

A. They were held at private homes.

[fol. 69] Q. Were they always held in the same private home or in different homes?

A. They were held in different homes.

Q. Were any of these meetings ever held in your own home?

A. Yes.

Q. Did you hold an official position in this club during your entire period of your membership in the Mexican Concentration Club?

A. No, not at first.

. . . . . .

Q. Now, do you recall about how long it was after you first were assigned to the Mexican Concentration Camp [sic], that you held any official position in that club?

A. Well, just after a couple of months that I was in the club, that I was assigned to the organization secretary job.

Q. How long did you serve in this capacity?

A. I served in that capacity until I was transferred in early '51, to the underground.

Q. Is there anyone in this room, other than myself, whom you have seen or known prior to this occasion?

A. Yes.

Q. Could you point out that person or persons?

A. Yes, Joe Gastelum or Joe Vega; he used two names.

. . . . . .

Q. You have indicated that you were acquainted with the respondent here as Joe Gastelum or Joe Vega; now, did you know him at any time to be a member of the Communist Party of the United States?

A. Yes.

Q. Where did you first meet Joe Gastelum?

A. At a meeting in the El Sereno Club.

Q. Are you referring to the El Sereno Club of the Communist Party of the United States?

A. Yes.

[fol. 70] Q. Do you recall about when that was?

A. '49.

Q. Were you introduced to Joe Gastelum at the time you first met him in the El Sereno Club or saw him in the El Sereno Club?

A. Yes; I was always introduced to new people that I had never seen before.

Q. Was he a member of the El Sereno Club?

A. Yes.

* * * * * * *

Q. Do you know whether he was a member of the El Sereno Club at the time you were assigned to that unit?

A. No, I didn't know it at the time I was assigned because I only knew a couple of people that were in there at the time I went into it.

Q. Did Joe Gastelum attend meetings regularly of the El Sereno Club?

A. I only saw him there a couple of times because I was only in the club for a couple—few months, and I saw him there a couple of times.

Q. On these two occasions in which you say you saw him in the El Sereno Club, were those meetings restricted in any way as to who could attend?

A. Yes, Communist Party members were all they had.

Q. After the El Sereno Club was broken up as you have testified, did you on any other occasion see Joe Gastelum?

A. Yes.

Q. Well, what were those other occasions upon which you saw him?

A. He was in the—we were put into a new group, called the Mexican Concentration group and he was in that same group with me.

Q. Now, when you speak of the Mexican Concentration Group; is that the same as the Mexican Concentration Club?

A. Yes.

Q. Is that—or was that also a unit of the Communist Party of the United States?

A. Yes.

[fol. 71] Q. Did Joe Gastelum attend meetings regularly of the Mexican Concentration Club?

A. Yes. He, just went once in awhile, but he was a regular member.

Q. Over what period of time did you see Joe Gastelum in meetings of the Mexican Concentration Club?

A. Well, from the time I went in it until the time I left it, I saw him there several times.

Q. To your knowledge, was he still a member of the Concentration Club at the time that you terminated your membership in 1951?

A. I don't think so; I think he was transferred out one time for some other kind of work in the Party, but it seems he came back and attended a few meetings after he had been gone for a period; I have forgotten when that period was.

Q. Do you recall how long a period that was?

A. No, I just can't think how long a period it was right now; it was some time ago.

Q. Was he transferred to the Mexican Concentration Club at the same time as yourself?

A. Yes.

Q. Do you know whether his membership continued into the year of 1950?

A. Yes.

Q. You have stated that as part of your duties as organizational secretary that you were responsible for the collection of dues; did you ever collect any dues from Joe Gastelum?

A. Yes; I collected all the dues from all the members.

* * * * * * * *

[fol. 72] Q. Did you collect dues from Joe Gastelum during the entire period of your membership in the Mexican Concentration Club?

A. Except for the time that he was—yes, except for the time that he was transferred out for some other job.

* * * * * * *

Q. To your knowledge was Joe Gastelum—did he ever hold an official position in either the El Sereno Club or the Mexican Concentration Club?

A. No, I don't remember offhand.

Q. Do you recall if any meetings of the Mexican Concentration Club were held in the home of Joe Gastelum?

A. No, I have never been in the home of Joe Gastelum.

* * * * * * *

[fol. 73] Q. Were any meetings ever held in the home of Fabian Elorriaga?

A. Yes, many of them.

Q. Did you ever see Joe Gastelum at any of the meetings of the—that were held in the home of Fabian Elorriaga?

A. Yes, I have seen him there a few times.

Q. Were these meetings Communist Party meetings?

A. Yes.

Q. Were they regular meetings of the Mexican Concentration Club?

A. Yes.

Q. Were those meetings restricted in any way?

A. Yes, to Communist members.

Q. Did you ever attend any conventions or general meetings of the Communist Party outside of the units which you have described?

A. Yes, I attended conventions.

Q. Where were those held, if you recall, and when?

A. I have been to some conventions they had at the Park Manor, I think was the name, out on Western, near Wilshire; they usually attended meetings there, the large ones.

Q. Were those Communist Party conventions?

A. Yes.

* * * * * * *

[fol. 74] Q. What was the nature of these conventions which you attended?

A. Well, they would have discussions on what was going on in the Party, and what drives were coming up.

* * * * * * *

Q. Who attended these various conventions which you saw were held at the Park Manor?

A. All of the executives of the Communist Party.

Q. Did you attend these conventions in an official capacity, yourself?

A. Yes.

Q. Do you know whether Joe Gastelum ever attended any such conventions?

A. I saw him at one convention one time.

Q. Do you recall when that was?

A. It was when I was in the El Sereno Club, we had a convention one time, at Echo Park, at the Echo Park Women's Club, a big hall, they had, and I saw Joe Gastelum there.

Q. Do you know whether he was there on [sic] an official capacity?

A. No.

Q. Was the attendance in this convention restricted in any way?

A. Yes, they were solely restricted to Communist Party members that we had to be identified by a panel to enter.

Q. Do you recall whether on the occasion at which you say you saw Joe Gastelum at the Echo Park Women's Club, was the attendance at that particular meeting so restricted?

A. Yes, you had to face the panel and give your club, your position of that club, and be identified by members that were on the, on this panel, before you were admitted.

* * * * * * *

Q. Could you approximate at this time, about how many meetings of the Mexican Concentration Camp, in which you saw Joe Gastelum?

A. Oh, about 15.

Q. Were all of these meetings restricted to Communist Party members, only?

[fol. 75] A. We had a couple of meetings one time, that wasn't restricted to communist members, as I recall over

some distribution of papers I think, but I think there was just a couple of them that wasn't.

Q. Other than these two meetings, were all of the other meetings in which you saw Joe Gastelum, restricted to Communist Party members only?

A. Yes.

• • • • • • •

DATE OF HEARING—April 30, 1956

Testimony of witness FABIAN CASADO ELORRIAGA

Special Inquiry Officer to Witness:

• • • • • • •

Q. What is your full name, please?

A. Fabian Casado Elorriaga.

• • • • • • •

Direct examination.

Examining Officer to Witness:

• • • • • • •

Q. When did you first become a member of the Communist Party of the United States?

A. About August, 1947.

Q. In what city did you become a member of the Communist Party of the United States?

A. In Los Angeles.

Q. For how long were you a member of the Communist Party?

A. Up until August of 1951.

• • • • • • •

[fol. 76] Q. When you first became a member of the Communist Party were you assigned to any unit or section or particular organization of the Communist Party?

A. • • • I was assigned first to the Brooklyn Avenue Club.

Q. • • • How long were you a member of the Brooklyn Avenue Club?

A. About four or five months.

Q. Were you then assigned to another unit?

A. From the Brooklyn Club I was assigned to the El Sereno Club.

• • • • • • •

Q. And how long were you a member of the El Sereno Club?

A. About four years.

Q. Did you become a member of any other unit or section or branch of the Communist Party after that?

A. You mean after '51?

Q. After the El Sereno Club?

A. For a while I was assigned to a smaller unit known as the Forty-Fifth Concentration.

• • • • • • •

[fol. 77] Q. When did you first become acquainted with this person you have identified as Joe Gastelum and Joe Vega?

A. I do not remember the exact year but I met him in the Forty-Fifth Concentration Club of the Communist Party.

• • • • • • •

Examining Officer to Witness:

Q. Under what circumstances did you meet the respondent here today?

A. I met him in meetings of the Communist Party.

Q. Now you have indicated that you were a member of three clubs or units of the Communist Party, in which of these three clubs or units of the Communist Party, did you meet the respondent?

A. In the Forty-Fifth Concentration Club.

Q. Do you know whether he was a member of that club?

A. He was a member of that club.

[fol. 78] Q. Now you say you met him in meetings of that club, how often would you say you saw the respondent in meetings of that club?

A. How often, about maybe three or four meetings a month.

Q. Do you recall over what period time in which you saw the respondent at these meetings—over how long a period of time?

A. Over a period of about three years.

Q. Do you know whether he was a member of the Communist Party?

A. I do.

Q. And how do you know that he was?

A. His presence at the party meetings.

* * * * * * *

Q. Was it possible at all that Joe Vega could have attended these meetings without having been a member of the Communist Party?

A. No, he could not have attended the meetings without being a member of the party.

Q. Do you know whether or not he held any office in the Communist Party?

A. In the smaller units, that is, in the Forty-Fifth Concentration Club he held one form of office.

Q. What was that office?

A. I don't remember. All I know at that time he was an official of the club because he attended a few executive meetings of the Forty-Fifth.

Q. Were you present at these executive meetings?

A. I was present at one meeting that I remember.

* * * * * * *

Q. Where was this so-called executive meeting held if you recall?

A. At the home of a member.

Q. What was the purpose of that meeting?

A. At this time I cannot say definitely the purpose but it was either organizational or to form an agenda for the regular meeting.

[fol. 79] Q. Was attendance at this executive meeting restricted in any way?

A. To Party members and probably officials of the club.

• • • • • • •

Q. To your knowledge when you terminated your membership in the Communist Party was the respondent here still a member?

A. He was.

• • • • • • •

[fol. 80] Redirect examination.

Examining Officer to Witness:

Q. Do you recall if Joe Gastelum was a member of the Brooklyn Avenue Club?

A. He was not a member of the Brooklyn Avenue Club.

Q. To your knowledge was he a member of the El Sereno Club?

A. I do not remember the respondent as being a member of the El Sereno Club.

Q. You have identified one other club or unit of the Communist Party, do you recall exactly what the true name of that other unit was?

A. If you are referring to the Forty-fifth I understood it at that time to be just the Forty-fifth Concentration Club only.

Q. The word Mexican did not appear in the official name of that organization?

A. It did not.

Q. Was the Forty-fifth Concentration Club a unit of the Communist Party of the United States?

A. Yes.

Q. Did you know Joe Gastelum to be a member of the Forty-fifth Concentration Club?

A. Yes, sir.

Q. Do you recall at this time about how many meetings of the Forty-fifth Concentration Club in which you have seen Joe Gastelum?

A. I remember about two or three meetings.

[fol. 81] Q. At any of those meetings in which you saw Joe Gastelum were any persons present who to your knowledge were not members of the Communist Party?

A. At those meetings there were no other persons present that were not members of the Communist Party.

• • • • • • •

Q. The question is were these meetings in which you saw Joe Gastelum in the Forty-fifth Concentration Club official meetings of the unit?

A. That is right, sir.

• • • • • • •

Q. You testified that you attended approximately two or three meetings of the Forty-fifth Concentration Club at which the respondent, Mr. Gastelum, was present, is that correct?

A. That is correct.

Q. Approximately when did these meetings take place, the month or day isn't necessary?

A. In 1951 and 1949.

Q. Do you limit it just to these two years or the period from '49 to '51?

A. I do not remember the years from 1949 to 1951 but I was present at one meeting in 1951 and another in 1949 with the respondent.

• • • • • • •

[fol. 83]

EXCERPTS FROM TRANSCRIPT OF THE DEPORTATION HEARING ACCORDED APPELLANT BY THE IMMIGRATION AND NATURALIZATION SERVICE—July 9, 1956

Testimony of Witness DANIEL SCARLETTO

• • • • • • •

Counsel to Witness:

Q. Prior to the time that you say that you were introduced to the respondent in 1949 had you ever seen the respondent before?

A. I don't recall right now seeing him before. I can't think right now where I had seen him before.

Q. Referring to the transcript at Page 183, your testimony of May 7 of this year in this case, I direct your attention to this portion of your testimony:

Question: "Did Joe Gastelum attend meetings regularly of the El Sereno Club?" And your answer was—

[fol. 84] (To Examining Officer: Do you have it, counsel?)

"I only saw him there a couple of times, because I was only in the club for a couple—few months and I saw him there a couple of times."

Do you mean—that's the end of your testimony—do you mean that you only saw Joe Gastelum two or three times?

A. Yes.

Q. By "couple" you mean two or three?

A. Yes.

Q. How much time elapsed between the time that you first saw him at a meeting of the El Sereno Club in 1949 until the next time that you saw Joe Gastelum at a meeting of the El Sereno Club?

A. I can't remember that right now.

Q. Do you know whether it was a matter of a day or a week or a month?

A. No, I don't remember just how much time elapsed there. That is, I just can't remember that now.

Q. Well, do you recall how much time approximately elapsed between the time that you first met Joe Gastelum at a meeting of the El Sereno Club and the last time that you saw him at a meeting of the El Sereno Club?

A. I don't remember that—that time.

Q. You have no recollection whether it was a day or a month or a year, is that correct?

A. Well, it wouldn't be a year, but I don't think that—I can't remember the time that elapsed between the few times that I have seen him.

Q. Well, do you have any recollection at all of the second time that you saw Joe Gastelum at a meeting of the El Sereno Club?

A. No, I can't remember how much time was in between the times that I had seen him. That I don't remember. If I did I would be glad to help you.

Counsel: I move to strike that answer as not being responsive.

[fol. 85] To Stenographer: Will you repeat the question again, please? (Question read back)

Inquiry Officer to Witness: In other words counsel isn't interested now in the lapse of time.

Counsel: We are through with that.

Inquiry Officer to Witness:

Q. Just whether you remember the date?

A. No.

Q. Of the second meeting. Is that clear?

Counsel to Witness:

Q. Is my question clear?

A. Yes, you want to know the times in between, if I saw him today, if I saw him next week.

Q. No. No.

To Stenographer: Will you repeat the question? I think I phrased it in that particular manner. I will rephrase it if it isn't clear.

(Question read back)

Witness: No.

Counsel to Witness:

Q. Do you have any present recollection, Mr. Scarletto, of the last time that you saw Mr. Gastelum at a meeting of the El Sereno Club in 1949?

A. No.

Q. Do you have a present recollection of the first time that you saw Mr. Gastelum at a meeting of the Mexican Concentration Club?

A. Of the first time?

Q. Yes.

A. When we had our first meeting, why we were all there.

Counsel: I move to strike that as not being responsive. You either do or you don't remember.

Witness: Yes, I seen Joe at our first meeting.

Counsel to Witness:

Q. Your answer to my question is yes, then?

A. Yes.

[fol. 86] Q. You have a present recollection. How many times did you see Mr. Gastelum at meetings of the Mexican Concentration Club?

A. Oh, he was at several of those meetings.

Q. By "several" do you mean more than a couple?

A. I certainly do.

Q. How many do you mean?

A. Oh, it could be 15, 16 times.

Q. By "could be" you mean—

A. Several times.

Q. —that you recall 15 times?

A. No, I don't recall. I am just saying that it was several meetings that I have seen him there over the period that I was—

Q. But you have no recollection of 15 separate occasions when you met him, is that what you mean?

A. I am just referring to that as being several times, yes.

Q. Well, do you have any present recollection of having seen him on 15 separate occasions at meetings of the Mexican Concentration Club?

A. No, I can't remember—well, it was several times that I saw him at these meetings, but I—

Q. But not 15?

A. It could be 15, it could be more.

Q. You have no present recollection in regard to the number of times?

A. Not the exact number, no.

. . . . . .

[fol. 87]

SUPREME COURT OF THE UNITED STATES

No. 39—October Term, 1962

JOSE MARIA GASTELUM-QUINONES, Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 293 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 88]

SUPREME COURT OF THE UNITED STATES

No. 293—October Term, 1962

JOSE MARIA GASTELUM-QUINONES, Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 39 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1961

No. 390

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1961

No.

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia denying petitioner's motion for a preliminary injunction to restrain his imminent deportation.

OPINION BELOW

The court below issued no opinion. Its judgment is appended hereto as Appendix A. Appended hereto as Appendix B is the opinion of the Court below in a prior litigation involving the petitioner. This opinion is reported at *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1961 (R. 54). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce was not material, when petitioner's deportation had been sustained by the Court of Appeals because of the absence of such evidence.

2. Whether petitioner has been deprived of an adequate judicial review of the deportation proceeding against him because the Court of Appeals first affirmed the deportation order on an erroneous construction of the statute and then, by sustaining a denial of a preliminary injunction against imminent deportation, precluded review of the BIA's refusal to allow petitioner to prove that he was not deportable even under the court's construction.

3. Whether, in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and *Scales* v. *United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare

organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."

4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

STATUTES INVOLVED

Section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .

Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT OF THE CASE

Petitioner, a Mexican national, has resided in the United States since he entered the country in 1920 at the age of 10. He is married and supports his wife, who resides in the United States. He has two American-born children and eight American-born grand-

children who live in this country. (R. 11, 23.) He was ordered deported on a finding that he had been a member of the Communist Party in 1949 and 1950, and hence was deportable under sec. 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C). (Exh. III, p. 30.)

The finding of past membership in the Communist Party derived from an evidentiary subfinding that petitioner had attended Party meetings and paid dues. No evidentiary findings were, or on the record could properly have been made, of any other Party activity of petitioner, of petitioner's political beliefs, or that petitioner had ever said or done anything at Party meetings.[1]

Petitioner did not testify at the deportation hearing. He took the position that under *Rowoldt* v. *Perfetto*, 355 U. S. 115, the Immigration and Naturalization Service had the burden of proving not merely a bare, organizational membership in the Communist Party, but one which constituted a "meaningful association." *Rowoldt* invalidated a deportation order against an alien who had been a dues-paying member of the Communist Party, had managed a Party bookstore, and had a degree of political sophistication and understanding of Communist theory. The evidence as to the nature of petitioner's membership was, therefore,

[1] In an opinion of May 12, 1958, the Board of Immigration Appeals described the basis for its finding as follows (Exh. III, p. 35):

> "Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness, Elorriaga."

much barer than that as to *Rowoldt's*. Accordingly, if petitioner was right as to where the burden of proof lay, the deportation order against him was invalid because the government had proved only a nominal membership and not one that constituted a "meaningful association."

The Board of Immigration Appeals (BIA) rejected this contention and held petitioner deportable. Its theory was that once nominal membership had been shown, a meaningful association would be presumed unless the alien came forward and demonstrated the contrary. (Exh. III, pp. 36-37.)

The petitioner then brought suit in the District Court for the District of Columbia to challenge the validity of the deportation order and the BIA's theory. The District Court gave judgment for the government, and on appeal the Court of Appeals affirmed. *Gastelum-Quinones v. Rogers*, 286 F. 2d 824 (Appendix B herein).

The Court of Appeals held, on that appeal, that once bare organizational membership in the Communist Party was established by the government, the alien was deportable unless he came forward and rebutted a presumption arising from the organizational membership. To this extent the court's holding was the same as the BIA's. But where the court departed from the BIA was as to the fact which was presumed. The court's holding on this subject was novel and unprecedented.

The court reasoned as follows: (1) The statute providing for the deportation of members of the Communist Party rests on (a) a legislative finding that the Communist Party espouses violent overthrow of

the government and (b) a legislative presumption that members of the Communist Party personally espouse this doctrine of their organization. (2) Both the finding and the presumption are reasonable and valid. (3) The holding of the *Rowoldt* case was that *this presumption that members of the Party personally advocated violent overthrow* was rebuttable. (4) In petitioner's case, the government, therefore, had made a prima facie showing merely by showing voluntary organizational membership; and since petitioner had not introduced evidence that he had not personally espoused violent overthrow, the deportation order was correct.

Until this decision came down, neither petitioner nor the government had supposed, or had any basis for supposing, that it was a defense to the deportation of a former member of the Communist Party that he had not personally adhered to violent doctrine.[2] Petitioner and the government had shared the view that the crucial question was not belief in violence, but the degree of the member's involvement in Party affairs no matter how innocent.[2] Where petitioner and the government differed was on the locus of the burden of proof —whether the government had to prove the requisite degree of involvement in Party affairs, all of which might be lawful and peaceable, or whether the alien had to disprove it, once simple membership had been established.

The Court of Appeals resolved this controversy, in a sense, by holding that the burden of proof was on the alien on the issue of whether his membership was of such a kind as to be cause for deportation. But the court reached this result by the road of analyzing the

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[2] See *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, *supra*

statute and this Court's decisions as creating a rebuttable presumption that a member personally advocated violence. There is no way of knowing how the court would have come out on the burden of proof issue if it had realized that its premises and analysis were wrong, and that whether or not membership was deportable depended on something other than personal espousal of violent doctrine.

Petitioner then petitioned this Court for certiorari (No. 711, Oct. Term, 1960). We pointed out in the petition that the Court of Appeals had formulated a rule, never before enunciated, that deportable membership was presumed, prima facie, from a showing of bare membership, and that the alien had the burden of disproving the presumption. We asserted that this presumption was at odds with *Rowoldt;* that at the very least *Rowoldt* had not settled the question as to the locus of the burden of proof on the question of meaningful membership; that the Court of Appeals had reached its conclusion on the basis of a faulty analysis of the statutory and case law; and that it was important that the issue as to the burden of proof be settled by this Court.

The government's opposition represented—with thorough inaccuracy—that the Court of Appeals had not created any new rule of law and that all that was involved was a factual issue turning upon the evaluation of testimony. Certiorari was denied. 365 U.S. 871.

The net result was that, under the law of petitioner's case established by the Court of Appeals decision, petitioner was being deported on the basis of a rebuttable presumption that he had personally advocated

violent overthrow, although neither he nor the government had known or had reason to know that he could have rebutted this presumption, and thus established non-deportability, by showing that despite his membership he had not so advocated.

In the face of this manifest injustice, petitioner filed a motion with the Board of Immigration Appeals requesting that the deportation proceeding be reopened so as to give him an opportunity to prove that he had never advocated or espoused violent overthrow, and thus was not deportable under the view taken by the Court of Appeals in his case. He pointed out that neither he nor the Service had previously known, or could reasonably have known, that such evidence was relevant, much less crucial. He supported his motion with an affidavit that he had never advocated or espoused violent overthrow; that he had never had any knowledge or belief that such advocacy was a tenet of the Communist Party; that he had always desired that changes should be accomplished by peaceable and constitutional means; and that if the deportation hearing were reopened he would so testify. (R. 32-38)

The BIA, after hearing oral argument, denied the motion, on the ground that the evidence which petitioner offered in his motion for reopening was not material to deportability. This was inconsistent with the opinion of the Court of Appeals in petitioner's case. The BIA resolved this difficulty by refusing to believe that the court could have meant its assertions that the presumption to be rebutted was that a member espoused violent doctrine, since those assertions were contrary to this Court's decisions in *Galvan and Rowoldt*, supra. At the same time, the BIA relied on the court's de-

cision as sustaining the BIA theory that deportable membership would be presumed from a showing of bare membership, unless rebutted by the alien. (R. 30) Thus the BIA regarded the decision of the Court of Appeals as having created a rule of law—although the government had represented the contrary in its opposition to certiorari.

The BIA also rejected petitioner's argument that the case should be reopened because of the light thrown on the meaning of membership in the Communist Party by *Scales* v. *United States*, 367 U.S. 203, decided after the Court of Appeals had issued its decision in petitioner's case (R. 30-31). In Scales, this court interpreted the membership clause of the Smith Act to mean "active" membership, citing as precedents the deportation cases of *Rowoldt* and *Galvan*, supra.

Petitioner then filed the complaint which initiated the present litigation, challenging the validity of the BIA's denial of his motion to reopen (R. 11-15). The District Court denied a preliminary injunction (R. 48) and the Court of Appeals summarily affirmed the denial without opinion. (R. 54) The affirmance was by the same two-judge panel that had decided the earlier case.

REASONS FOR GRANTING THE WRIT

I. As a result of a confusion of the Court of Appeals, contributed to by neither party to the litigation, petitioner and his family face the cruelty of his exile from the country where he has resided since childhood, although the following circumstances exist:

(a) The deportation order is probably erroneous.

(b) The deportation order was sustained by the Court of Appeals on the basis of an erroneous legal analysis made by the Court *sua sponte*.

(c) Petitioner has been denied the opportunity of proving that he is not deportable even under the court's erroneous theory because the BIA relied on that part of the court's decision which favored the government while rejecting as incredible that part which favored petitioner.

When petitioner's deportation case first came to the Court of Appeals, the question involved was one which arose out of, but had not been settled by, *Rowoldt* v. *Perfetto*, 355 U.S. 115. *Rowoldt* held that not every past member of the Communist Party was a "member" for the purpose of the Communist deportation statute. Previously, *Galvan* v. *Press*, 347 U.S. 522, 527, 529, had stated that "nominal" members were not deportable. *Rowoldt* held membership to be a cause for deportation only if the alien member had engaged in Party activities which made his membership a "meaningful association." It is clear from *Rowoldt*, as well as from *Galvan and Harisiades* v. *Shaughnessy*, 342 U.S. 580, that the activity establishing deportability need not indicate the alien's personal commitment to violent doctrine. As stated in *Scales* v. *United States*, 367 U.S. 203, 223, ftn. 15, which transferred the *Rowoldt* concept to the Smith Act's membership clause:

> "The element of 'activity' in the proscribed membership stands apart from the ingredient of guilty 'knowledge' in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities."

In *Scales* (at 255, ftn. 29), the Court affirmed a trial court instruction that for the purposes of the Smith Act Communist Party membership

> "must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

And in *Nyukkanen* v. *McAlexander*, 265 F. 2d 825, 828, aff'd 362 U.S. 390, the Ninth Circuit observed:

> "The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words 'meaningful association,' as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under consideration."

The evidence credited by the BIA amounted to nothing more than petitioner's attendance at some closed Party meetings and payment of Party dues in 1949 and 1950. This was far less evidence of significant membership than existed in *Rowoldt*. (See *supra*, p. 4.) Still less did it meet the *Scales* test that a person was more than a passive or technical member only if he devoted a substantial part of his time and efforts to the Party.

The BIA nevertheless sustained the deportation, on the theory that once nominal membership had been shown, the burden of proof shifted to the alien. The question before the Court of Appeals on the first review was whether this theory was correct. Although

language in *Rowoldt* points to a negative answer, the question was novel, having never been determined before by this Court or another Court of Appeals.

On principle, the BIA position was unsound. The burden of proving that a resident alien is within a deportable class is squarely on the government. See *Kimm* v. *Rosenberg*, 363 U.S. 405, 412-413 (dissenting opinion); *Chew* v. *Rogers*, 257 F. 2d 606; *Zito* v. *Moutal*, 174 F. Supp. 531, 538. The deportable class in this instance is a member whose membership was a "meaningful association." A presumption that membership entailed such an association is supported by neither experience nor logic, particularly under the *Scales* and *Rowoldt* standards of what constitutes the necessary association. To the contrary, in view of the resources at the command of the government and its well-known close surveillance of the Communist Party, the government's inability to prove more than mere organizational membership in a given case indicates that there was nothing more to prove. Moreover, a finding of deportability may not be rested on mere inference, in view of the provision in section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. C. 1252(b)(4), that, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

The Court of Appeals, in sustaining the deportation order on its first review, missed all the relevant considerations. Instead of deciding whether a sufficiently active membership to be a "meaningful association" could be inferred solely from mere organizational membership, it reasoned that Congress had intended that a personal addiction to violence be inferred from such membership. It held, therefore, that petitioner was

deportable because he had failed to introduce proof that he had no such addiction. This decision was based on what is obviously a thoroughly mistaken analysis of the relevant statutory and case material.

Neither petitioner nor the government knew, or could have been expected to know, that the crucial issue of deportability was whether petitioner personally espoused doctrines of violence. Thus petitioner was held deportable by the court for failure to prove something which he had never had an opportunity to prove.

The petitioner, therefore, was on sound ground in his motion to reopen the proceeding. The BIA's denial of the motion adopted the impermissible technic of relying on that part of the court's opinion which supported deportation, while rejecting the part which supported the motion to reopen.

When the case came back to the Court of Appeals, it should have done one of two things. The technically correct course would have been to reverse the BIA for its failure to apply the law of petitioner's case as established by the court's opinion. As stated in *Thompson* v. *Maxwell Land Grant & Ry. Co.*, 168 U.S. 451, 456:

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.
>
> * * * * *
>
> We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly

> examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case."

As a second possibility, the court, having realized that its analysis and theory on the first review were erroneous, might have reexamined the validity of the deportation order in the light of correct premises and the intervening decision in *Scales*, and then issued an opinion setting straight its original opinion and meeting the issue on sound grounds.

The court, however, took neither of these two courses. Instead, summarily and without explanation it affirmed the BIA's refusal to reopen. Thus it acted inconsistently with the law which it had established for the case, but simultaneously failed to reconsider or articulate what should be the law of the case. For all practical purposes, petitioner, though twice before the Court of Appeals, has been denied an adequate judicial review.

2. The court's inconsistent actions leave this field of deportation law in a state of uncertainty and ambiguity. On the basis of the court's reported opinion, issued on the first review of petitioner's deportation, aliens charged with Communist Party membership will naturally suppose that a crucial issue in the deportation proceeding is whether they personally espoused violence. Yet the immigration authorities, fortified by the court's unreported decision on the second review, have adopted and will apply a rule of law that this issue is immaterial.

3. The presumption which the immigration authorities are applying, and which they now consider judi-

cially blessed by the strange course of this litigation, has still not received a sound judicial examination. Yet, for reasons already stated, the BIA's rule seems clearly wrong. This error is being perpetuated in aid of the enforcement of a statute which impinges on human rights, whose harshness and unfairness were noted in the very decision which sustained it (*Galvan v. Press, supra*, at 530), and "whose constitutionality was upheld here only on historical grounds" (*Kimm v. Rosenberg, supra*, at 115, dissenting opinion). The Court should not confirm by default a presumption created by the BIA which expands the statute's cruel and purposeless results.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,552

JOSE MARIA GASTELUM-QUINONES, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Appellee*.

Before: DANAHER and BASTIAN, *Circuit Judges*, in Chambers.

Order

Upon consideration of appellant's motion for stay of deportation pending appeal and of appellee's opposition and of appellee's motion to affirm the judgment of the District Court, of appellant's opposition and of appellee's reply, it is

ORDERED by the court that the motion for stay of deportation is denied and that the judgment of the District Court appealed from herein is affirmed.

PER CURIAM

Dated: SEP. 13, 1961

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,429

JOSE MARIA GASTELUM-QUINONES, *Appellant*

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided December 8, 1960

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before, EDGERTON,* DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from a judgment of the District Court dismissing appellant's [plaintiff's] complaint for review of an order of deportation issued by the Board of Immigration Appeals [Board]. The order complained of was issued pursuant to authority delegated to the Board by the Attorney General under § 241(a)(6), of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(6), which reads in pertinent part:

---

* Judge Edgerton took no part in the consideration or decision of this case.

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . . .

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . .

"(C) Aliens who are members of . . . the Communist Party of the United States . . . ."

Appellant, a Mexican national, first entered the United States in 1920 and has resided here since that time. On February 28, 1957, a special inquiry officer of the United States Department of Justice, Immigration and Naturalization Service, after hearing on a rule to show cause issued March 23, 1956, found that, after his aforementioned entry into the United States, appellant was a voluntary member of at least two units of the Communist Party of the United States in Los Angeles, California. At the hearing, although voluntarily placed under oath, appellant, upon advice of counsel, invoked the Fifth Amendment and refused to testify. Appellant was accordingly ordered deported.

On November 14, 1957, the Board, to which appellant had appealed, ordered the appeal dismissed on the basis of the testimony before the special inquiry officer and his findings. The Board, in the appellate proceeding, stated that appellant was represented by able counsel, who was given the widest latitude in conducting his defense. Reviewing the testimony, the Board said:

"Counsel contends the record does not establish that respondent's membership was voluntary. The testimony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, an attempt was made

to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary."

We think the record amply supports this finding.

About one month later, on December 9, 1957, the Supreme Court rendered its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). On the basis of that decision and at appellant's request, the Board reopened the case so that, in the Board's words, "[appellant] will be permitted to present such evidence as may be appropriate [to place his case within the framework of Rowoldt]."

All that occurred at the reopened hearing before the special inquiry officer was that appellant's counsel made a statement to the effect that the evidence of record did not establish the "meaningful association" adverted to in *Rowoldt*, that a *prima facie* case did not exist and, therefore, that it was unnecessary to offer any further evidence. Accordingly, appellant again did not take the stand nor offer any evidence.

After the second and abortive hearing, the special inquiry officer filed his second opinion, calling attention to the fact that appellant had refused to testify during the original hearing, on a claim of privilege, and added:

"Although the respondent's motion requested reopening of the proceedings to offer testimony which he alleged would place him within the framework of *Rowoldt*, and despite the fact that the Board of Immigration Appeals granted the reopening for said pur-

pose, the respondent failed to testify, to offer any documentary evidence, or to present any witnesses at the reopened hearing."

Calling attention to the fact that, despite the reopened hearing, the sum total of the evidence of record was exactly the same as it was when the decision of February 28, 1957, was entered and that the only new development was the Supreme Court's *Rowoldt* decision, the special inquiry officer proceeded to compare *Rowoldt* with the instant case, holding them to be clearly distinguishable, quoting from the decision of the Board in ordering reopening of the case as follows:

"In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party*. Quite different then is the situation in the instant case from that in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications. This type of a

balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the norinal inferences which flow from the joining of a political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to 'crawl into.' This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield*, 252 F. 2d 191, C.A. 6, February 14, 1958)"

The special inquiry officer, therefore, reaffirmed his original findings of fact and conclusions of law and, there being no request for discretionary relief, again ordered deportation. The appeal taken from that order was dismissed by the Board on May 18, 1959, the Board concluding its opinion as follows:

"Both side are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed."

Thereupon, appellant filed in the District Court his complaint for review of the deportation order, and for declaratory judgment and injunctive relief. On cross motions for summary judgment, the Board's motion for summary judgment was granted, that of appellant was denied, and the complaint was dismissed. This appeal followed.

Appellant's principal contention is that *Rowoldt* established a concept of "meaningful association" which requires the Government to show something more than mere membership in the Communist Party before a deportation order can validly be issued. In considering this contention, involving as it does the meaning of a recent Supreme Court decision, a brief study of the development of the present law will be helpful.

It is well settled that an alien who is in the United States must be afforded procedural due process before he may be constitutionally deported. *Ng Fung Ho v. White*, 259 U.S. 276 (1921), *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947). Under the Alien Registration Act of 1940, 54 Stat. 670, the pertinent ground for deportation was advocacy of the overthrow of the United States Government by force and violence. This ground was upheld as consistent with due process in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951). Under the Act of 1940 it was necessary in each deportation case involving membership in the Communist Party to prove that the individual advocated overthrow of the government by force and violence. The position of the Communist Party itself was immaterial.

The Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, dispensed with the need for proving, in each individual case, that an alien involved advocated overthrow of the government by force and violence, and made Communist Party membership the test. The Supreme Court upheld this lessened burden of proof as constitutional in *Galvan v. Press*, 347 U.S. 522 (1954). In *Galvan* the Court placed great emphasis on a detailed legislative finding, contained in §2(1) of the Act that:

> "[The] Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to

establish a Communist totalitarian dictatorship . . ." At page 529.

The section here involved was then in effect in its present form. The Court held that the word "member" as used in 8 U.S.C. § 1251(a)(6)(C), the section involved here, was not limited to those "members" of the Communist Party who are fully cognizant of and who endorse the Party's advocacy of violence.

> "It must be concluded . . . *that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joing an organization known as the Communist Party which operates as a distinct and active political organization*, and that he did so of his own free will." [Emphasis supplied.] Galvan v. Press, *supra*, at page 528.

In *Galvan* the Supreme Court also mentioned that, "Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only . . .'" thus lending inferential support to the Government's view that the burden is on the alien to show that his Party membership was something other than bare organizational membership.

Under the 1940 Act, membership in the Communist Party was not a ground for deportation, but actual personal advocacy of the overthrow of the government by force and violence was. Under the present Act as interpreted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party.

It seems to us that the detailed legislative finding contained in § 2(1) of the 1950 Act and quoted *supra* makes

the latter ground consistent with due process. The legislative finding merely states that the Communist Party as a political organization is devoted to the overthrow of the Government of the United States by force and violence, the ground upheld by *Harisiades* v. *Shaughnessy*, *supra*. The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the "meaningful association" required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan*. Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.

Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and

since appellant here failed to offer any evidence whatsoever, the presumption must stand.

We add that the Board "did not draw any inference from the fact of appellant's silence that his testimony would have been adverse to him if given." Nor have we drawn an inference. Whether such an inference may be drawn we need not, under the circumstances of this case, determine. The judgment of the District Court is

Affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 293

JOSE MARIA CASTELUM-QUIÑONES, *Petitioner*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

JOSE MARIA GASTELUM-QUINONES, *Petitioner*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed an order of the United States District Court for the District of Columbia granting judgment against petitioner in a suit brought by him to enjoin his deportation from the United States.

OPINION BELOW

The court below issued no opinion. Its judgment is reproduced in Appendix A, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1962 (2 R. 2). A timely petition for rehearing was filed on March 9, 1962 (2 R. 3), and was denied on May 7, 1962 (2 R. 6). This Court's jurisdiction arises under 28 U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce, and could not have previously introduced, was not material, when petitioner's deportation had been previously sustained by the Court of Appeals because of the absence of such evidence.

2. Whether the Court of Appeals erred, and in effect denied petitioner judicial review, because after it had affirmed the deportation order on a misconstruction of the statute which eliminated judicial evaluation of the evidence according to standards established by decisions of this Court, it then sustained the refusal of the Board of Immigration Appeals to allow petitioner to prove that he was not deportable even under the court's construction.

3. Whether, in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and *Scales* v. *United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."

4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

5. Whether the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46, by transferring petitioner's appeal from the three-judge panel to which it was originally assigned to a panel of which it was clearly predictable that only two of the three judges would participate and of which only two did participate.

STATUTES INVOLVED

(1) Section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> "(6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * *
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ."

(2) Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

(3) 28 U. S. Code, sec. 46, provides:

> "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> "(b) In each circuit the court may authorize the hearing and determination of cases and contro-

versies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controveries shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

STATEMENT OF THE CASE

This petition is in the same litigation as the pending petition for certiorari in *Gastelum-Quinones* v. *Kennedy*, No. 39, Oct. Term 1962, originally docketed as No. 520, Oct. Term 1961, and carried over to the current term. In No. 39, the petition seeks review of the affirmance by the Court of Appeals of the District Court's denial of a preliminary injunction against petitioner's deportation.* This petition seeks review of the court's affirmance of the final judgment entered by the District Court. Of the five questions presented by this petition, the first four are presented and discussed in the No. 39 petition.**

---

* Petitioner is still here to litigate only because on September 28, 1961, the Chief Justice stayed his deportation pending the filing and disposition of the No. 39 petition.

** The record filed in this case starts where the record in No. 39 ends. However, the record of the administrative proceedings in the deportation case is contained in the present record as D. Ex. A.

The petition in No. 39 was filed on October 27, 1961. In our reply to the government's opposition thereto, we advised the Court that after the filing of the petition the District Court had granted final judgment against petitioner; that petitioner had appealed therefrom to the Court of Appeals; and that in the event of another adverse decision by that court, we would again petition for certiorari. We suggested that this Court withhold action on the No. 39 petition pending determination by the Court of Appeals of the then pending appeal. Apparently this Court accepted that suggestion.

For the purposes of this petition, we adopt the contents of our petition in No. 39. We take up where the No. 39 petition stopped.

The Court of Appeals affirmed the denial of the preliminary injunction on September 13, 1961 (1 R. 5). On October 13, 1961, the respondent filed in the District Court a motion for summary judgment (1 R. 7). On October 25, 1961, the District Court granted summary judgment in favor of respondent and dismissed the complaint (1 R. 29).

Petitioner appealed to the Court of Appeals (1 R. 37). The respondent moved to affirm. The motion came before a division consisting of Circuit Judges Fahy, Danaher and Bastian. This division ordered sua sponte that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal contesting the validity of the deportation order (2 R. 1). That division had consisted of Judges Edgerton, Danaher and Bastian, but Judge Edgerton had not participated. (See *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824, also appearing in Appendix B to petition for certiorari in No. 39.) Fur-

thermore, the affirmance of the denial of the preliminary injunction had also been by only two judges, Judges Danaher and Bastian (1 R. 5).

The division to which the motion had been referred then affirmed the judgment of the District Court. The order of affirmance (to which this petition is addressed) recited, "Circuit Judge Edgerton took no part in consideration of the above motion" (2 R. 2).

Petitioner then filed a petition for rehearing by the court en banc (2 R. 3-5). The petition pointed out that because of Judge Edgerton's repeated non-participation, "each of appellant's three appeals has been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate." The petition submitted that in view of the unusual situation, the only practicable method by which petitioner could have the benefit of consideration by more than two judges, in accordance with the intention of 28 U. S. Code, sec. 46, was to have the case reheard en banc. On May 7, 1962, the court denied the petition for rehearing (2 R. 6).

REASONS FOR GRANTING THE WRIT

As already indicated, the reasons for granting the writ as to the first four questions presented are fully set forth in our petition in No. 39, and will not be repeated here. The fifth question arises as the result of later developments in the litigation.

28 U. S. Code, sec. 46, requires that appeals be determined by a division of three judges or by the full court. While it provides, for obvious practical considerations, that two judges shall constitute a quorum

of a three-judge division, the clear basic intention is that decision shall be by three judges.

The appeal was initially assigned to a division of Judges Fahy, Danaher and Bastian. When this division referred the case to a division of Judges Edgerton, Danaher and Bastian, it must have known that Judge Edgerton would not participate. For although Judge Edgerton had been a member of the division assigned to the two earlier appeals involving the deportation proceeding, he had not participated. And in fact Judge Edgerton did not participate in the appeal following the reference. Thus the referral by the Fahy-Danaher-Bastian division to the Edgerton-Danaher-Bastian division was actually not a referral to another division at all; it was merely an elimination of Judge Fahy, which insured that appellant's appeal would be decided by only two judges, just as his previous appeals had been.

The course taken by the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46. The statute's basic intent that decision be by three judges was vitiated by the transfer of the case to a panel of which, it was clear, only two judges would sit, and only two did sit.

Thus we have a curious climax to this curious litigation. Petitioner is faced with a cruel and irrational deprivation of his personal liberty. As our petition in No. 39 shows, the deportation order against him is erroneous on principle and probably under the decisions of this Court. The deportation order was sustained on the basis of an erroneous legal analysis adopted by the Court of Appeals entirely on its own, neither of the parties having ever advanced it. As a result, the court never reached the real issue in the case, namely, the burden-of-proof question which was

not settled by *Rowoldt* v. *Perfetto*, 355 U.S. 115. Nor did the court ever evaluate the evidence in the light of the *Rowoldt* standard. Then the Board of Immigration Appeals, incredulous that the court could have meant what it said, denied petitioner the opportunity to prove that he is not deportable even under the court's erroneous theory; in doing so, the Board relied on that part of the court's decision which favored the government, while rejecting that part which favored petitioner. When the case came back to the Court of Appeals, the court simply washed its hands of the matter, the appeal being decided summarily and without explanation by the same two judges who had created the untenable situation. Accordingly, petitioner has now had three appeals decided against him, without once having had a genuine judicial review by the Court of Appeals.

CONCLUSION

Certiorari should be granted in this case and in No. 39, and the judgments below reversed.

Respectfully submitted,

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APPENDIX A—The Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961
District Court
Civil Action 2565-61

No. 16,747

JOSE MARIA GASTELUM-QUINONES, *Appellant*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*.

Before: EDGERTON, DANAHER and BASTIAN, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellee's motion to affirm and of appellant's opposition, it is

ORDERED by the Court that the judgment of the District Court appealed from in this case is affirmed.

PER CURIAM.

Dated: Feb. 23, 1962

Circuit Judge Edgerton took no part in consideration of the above motion.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 520

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A) is not reported. The prior opinion of the court of appeals (Pet. App. B, pp. 2-10) is reported at 286 F. 2d 824, certiorari denied, 365 U.S. 871.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1961 (Pet. App. A). The petition

for a writ of certiorari was filed October 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should be permitted to challenge again the administrative finding that he was deportable as an alien who, after entry, had become a member of the Communist Party where, on a previous reopening of the deportation proceedings, petitioner had submitted no evidence to contradict the government's proof that he had been a "meaningful" member, and where he has had full judicial review of that factual determination.

STATUTE INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *
>
> * * * *

STATEMENT

This is the second round of judicial review instituted by petitioner, a native and national of Mexico, from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act of 1952, *supra*, p. 2. The pertinent facts may be summarized as follows:

A. The original proceedings.[1]

1. On February 28, 1957, following a hearing, petitioner was ordered deported by a special inquiry officer on the ground that, after entry into the United States, he had been a voluntary member of a least two units of the Communist Party. This finding was based on the testimony of two former members of the Communist Party that petitioner had attended closed meetings of small units of the Party from 1949 through 1951; that he had paid Party dues; and that he had attended a Communist Party convention at which members were screened before they were permitted to enter. Petitioner declined to testify at the hearing. On November 14, 1957, an appeal from the order of deportation was dismissed by the Board of Immigration Appeals.

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[1] A detailed summary of these proceedings and of the facts is set forth in the government's brief in opposition to the first petition for a writ of certiorari in this case (No. 711, O.T. 1960, pp. 3-6).

2. In January 1958, after this Court's decision in *Rowoldt v. Perfetto*, 355 U.S. 115 (decided December 9, 1957), the petitioner moved the Board of Immigration Appeals to reconsider the order of deportation in the light of that decision, or to reopen the proceedings to enable petitioner to offer testimony. The Board, although concluding that on the existing record *Rowoldt* did not govern the case, ordered the hearing reopened to permit petitioner to present evidence. However, petitioner did not testify or present evidence at the reopened hearing. Instead, he simply offered a statement by his counsel that the existing record did not establish a "meaningful" association in the Communist Party within the meaning of the *Rowoldt* decision. The hearing officer and, on appeal, the Board of Immigration Appeals found that the record, upon which petitioner was thus willing to rest, did establish such meaningful membership.

3. On May 22, 1959, petitioner sought judicial review of the order of deportation in the United States District Court for the District of Columbia, claiming that the record did not establish meaningful membership. The district court sustained the order of deportation; the court of appeals affirmed, 286 F. 2d 824; and this Court denied a petition for a writ of certiorari, 365 U.S. 871.

Petitioner's principal challenge in that proceeding, was, in the words of the opinion of the court of appeals, that "Rowoldt established a concept of 'meaningful association' which requires the Government to show something more than mere membership in the Communist Party before a deportation order can

validly be issued" (286 F. 2d at 827, Pet. App. 7a). This contention the court of appeals rejected. Its opinion quoted the statement in *Galvan* v. *Press*, 347 U.S. 522, 528, that "support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation" (286 F. 2d at 827, Pet. App. 8a). The court went on to state that it interpreted the statute as applying "to membership in the organization a presumption of espousal of the doctrines of the organization", which in the case of the Communist Party the Congress had found to include advocacy of violent overthrow, and that it read *Rowoldt* as "making that presumption rebuttable" (286 F. 2d at 828, Pet. App. 9a). The Court further pointed out that the Board of Immigration Appeals had drawn no inference from petitioner's silence, and that it therefore found no occasion, under the circumstances, to decide whether such an inference could be drawn (286 F. 2d at 828, Pet. App. 10a).

B. The present proceedings.

1. On May 4, 1961, following the denial of the petition for a writ of certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings so that he could testify that he never personally advocated the overthrow of the government by force and violence and that he had no knowledge that the Communist Party advocated violent overthrow. He contended, in essence, that this issue of personal advocacy was interjected into the case by the court of appeals and that, until the opinion of the court of appeals, neither he nor the

government had considered that lack of personal advocacy was relevant to the issue of deportability (1 R. 22-26).[2]

2. The Board of Immigration Appeals refused to reopen the proceedings for a second time (1 R. 16-20). It ruled that, in the light of the decision in *Galvan* v. *Press*, *supra*, rejecting a claim by an alien that he was not aware of the Party's true purpose or program, "an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or unconsciously in appearance only" (1 R. 19). The Board further rejected the argument that the test of membership laid down in relation to criminal prosecutions under the Smith Act in *Scales* v. *United States*, 367 U.S. 203, applies to deportation proceedings (1 R 19-20). The Board concluded that, "there is uncontradicted testimony to show that a voluntary meaningful membership existed;" that, at the reopened hearing, petitioner had "been given an opportunity to show that his membership was nominal" but refused to present evidence on this issue; and that there was "no reason to believe his membership was nominal" (1 R 20).

3. Petitioner thereupon instituted in the district court a second action for judicial review and sought a temporary restraining order and preliminary injunc-

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[2] "R" designates the two-volume record now before the Court.

tion (1 R 4-8). On August 14, 1961, the district court denied a preliminary injunction, with findings of fact and conclusions of law (1 R 38-42; 2R 48). On application to the court of appeals for a stay of deportation, that court denied a stay and affirmed the judgment of the district court (Pet. App. A).[*]

ARGUMENT

Although petitioner now admits (Pet. 10) that, under the decisions of this Court, deportability for membership in the Communist Party "need not indicate the alien's personal commitment to violent doctrine," the attempt to show lack of such personal commitment was the basis of his motion to the Board of Immigration Appeals to reopen the deportation proceedings. Thus, by his own admission, denial of the motion to reopen was proper. Whether he was or was not justified in thinking that the prior opinion of the Court of Appeals made that issue material is irrelevant; the fact is that the Board of Immigration Appeals acted correctly under the controlling decisions of this Court.

Beyond that, petitioner is merely attempting to reargue what he argued before—that the evidence of his membership in the party was not sufficient to show meaningful membership within this Court's holding in *Rowoldt* v. *Perfetto*, 355 U.S. 115. His argument has no more merit now than it had then. There was

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[*] On October 25, 1961, the district court, after oral argument, granted the respondent's motion for summary judgment.

evidence from independent sources that petitioner was an active, dues paying, voluntary member of the Communist Party. Although given full opportunity to prove that his membership was merely nominal, or that as in *Rowoldt* it was not meaningful because it was motivated by other than political considerations, petitioner declined to offer evidence which would bring this case within the framework of *Rowoldt*.

Manifestly, the test of membership for the purposes of criminal prosecution under the Smith Act, as laid down in *Scales* v. *United States*, 367 U.S. 203, is not the same as for deportation under the Immigration and Nationality Act of 1952. The opinions of this Court have made it clear that, for the purposes of deportation, membership in the Communist Party is established where the evidence reveals that "the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will," *Galvan* v. *Press*, 347 U.S. 522, 528-529. The decisions since *Rowoldt* have recognized that that case did not change the basic standard adopted in *Galvan*. See *Niukkanen* v. *McAlexander*, 362 U.S. 390; *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

NOVEMBER 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 620012 628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 39

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER

DAVID REIN
JOSEPH FORER
711 Fourteenth St., N.W.
Washington, D. C.
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 520

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY FOR PETITIONER

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1. The government seems to agree (Opp. 5) that the Court of Appeals sustained the order of deportation on the theory that the statute creates a rebuttable presumption of the alien's personal advocacy of violent overthrow of the government from mere membership in the Party. It asserts that this theory conflicts with the decisions of this Court, but concludes that this is

irrelevant. So long as the alien is to be deported, it is, in the government's view, of no consequence that this is being done on the basis of an erroneous theory of law.

2. The government acknowledges that the Court of Appeals rejected petitioner's legal contention that *Rowoldt* requires the government to show something more than mere membership in the Communist Party before a deportation order can validly be issued (Opp. 4-5). It does not argue or even suggest that this contention of petitioner was unsound, or that the court below was correct in rejecting it. Instead, it urges the Court to ignore the entire question on the contradictory and erroneous representation (Opp. 7-8) that the ruling below was bottomed upon factual findings that the petitioner was an active member, and that accordingly, the requirement of *Rowoldt* that more than mere membership be shown was met.

It is true that the petitioner is an alien and thus subject to deportation if the facts in his case bring him within a class ordered deported by Congress. On the other hand, he has lived in this country since he entered in 1920 at the age of 10. He is married and supports his wife, who resides in the United States. He has two American born children and eight American born grandchildren. He has been law-abiding and industrious during his entire stay in the country. There does not appear to be any objective justification for the government's harsh view that neither facts nor law must be permitted to thwart his deportation.

3. As noted in the government's opposition (p. 7, ftn. 3), during the pendency in this Court of the peti-

tion for a writ of certiorari[1] the government moved for and was granted summary judgment in the District Court. The petitioner's appeal from this judgment is now pending in the Court of Appeals, No. 16,747.[2] In the advent of another adverse decision by the Court of Appeals below, petitioner will apply to this Court for a petition for a writ of certiorari to review that judgment as well. Under the circumstances, we submit that it would be more expeditious in the long run, if the Court withheld action on the present petition pending determination by the Court of Appeals of the appeal presently pending before it.[3]

Respectfully submitted,

DAVID REIN
JOSEPH FORER
711 Fourteenth St., N.W.,
Washington, D. C.
Attorneys for Petitioner

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[1] Chief Justice Warren had granted a stay of deportation pending the filing and disposition of a petition for a writ of certiorari.

[2] This appeal raises the additional and important question of the lack of jurisdiction of the District Court to act during the pendency of an appeal, if the purpose or effect of the District Court's action was to interfere with or nullify the action of the higher court. See 7 Moore's Federal Practice 3158-9.

[3] We are attaching to this reply a copy of a letter recently received from petitioner's physician. The letter shows that petitioner's early deportation is not practicable in any event.

APPENDIX

CEDARS OF LEBANON HOSPITAL

4833 Fountain Ave.
Los Angeles 29, California

November 22, 1961

RE: GASTELUM, JOSE
OPD #107145

Mr. Maynard J. Omerberg
Attorney at Law
Suite 101, Hollywood-Ivar Building
1741 North Ivar Avenue
Hollywood 28, California

Dear Mr. Omerberg:

In answer to your letter of November 18, 1961, the following is a brief summary of Mr. Gastelum's medical problems and expected course.

Mr. Gastelum was admitted to Cedars of Lebanon as an emergency on November 9, 1961, for acute upper gastrointestinal bleeding. His blood pressure was at shock levels and he required an immediate transfusion of three pints of whole blood. This is the third episode of such bleeding, and following X-ray confirmation of his duodenal ulcer disease, and in view of his intractability on medical management, it has been elected to perform definitive surgery in his case. This will take place early next week. He is currently being managed on close supervision as an inpatient, with diet, antacids and antispasmodic drugs. He is otherwise in good healt and should easily withstand the contemplated surgery.

There are, of course, inherent complications involved in a case of this sort. Many patients have prolonged difficulty in readjusting to a smaller gastric pouch and feeding becomes a problem. In addition, there is a certain incidence of recurrence of this disease following surgery. There are on occasions long-term nutritional and anemia problems.

It is for the above reasons that we feel Mr. Gastelum should be under close medical supervision for a minimum of three months following surgery, and should certainly be seen at frequent intervals by physicians familiar with his case for at least one year.

He is at present a fully eligible clinic patient at Cedars of Lebanon Clinic, and we look forward to following his case with interest.

Sincerely yours,

s/ Theodore A. Loseff
THEODORE A. LOSEFF, M. D.
Resident in Surgery

TAL:hw

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 293

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

As petitioner states (Pet. 4), the major issues in this case were presented by petitioner and answered by the government in No. 39, this Term (No. 520, O.T. 1961), involving petitioner's application for review of the denial of a preliminary injunction in the second round of his judicial review of an order of deportation. The only new issue raised concerns the assignment of petitioner's appeal from a subsequent order of the district court dismissing the complaint to the same division of the court which heard his first appeal when one of the members of that division had not participated in the earlier decision.

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Petitioner was ordered deported in 1957 after a hearing at which evidence was introduced that he was an active, dues paying, voluntary member of the Communist Party. After the decision of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115, the administrative proceedings were reopened at petitioner's request to permit petitioner to present evidence that he came within the rationale of that decision. He did not present evidence at the reopened hearing, and the administrative authorities found, on the record already before them, that the evidence showed that petitioner's membership was meaningful within the *Rowoldt* decision. The order of deportation was subsequently upheld by the district court. The court of appeals affirmed and a petition for a writ of certiorari was denied by this Court. 286 F. 2d 824 (C.A.D.C.), certiorari denied, 365 U.S. 871. The division of the Court of Appeals for the District of Columbia Circuit which passed on the case consisted of Judges Bastian, Danaher and Edgerton, but Judge Edgerton did not participate.

After the denial of the petition for a writ of certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings, asserting that he wished to testify that he never personally advocated the violent overthrow of the government and never knew the Communist Party so to advocate. Petitioner contended that the issue of personal advocacy was injected into the case for the first time by the opinion of the court of appeals. After the Board of Immigration Appeals refused to reopen the proceedings for a second time, petitioner again sought

judicial review. His request for a temporary restraining order and preliminary injunction against his deportation pending such review was denied. The denial was affirmed upon appeal by Judges Bastian and Danaher. Review of that order is sought by the petition in No. 39.

While that petition for a writ of certiorari was pending, the district court granted summary judgment in favor of the government and dismissed the complaint. After petitioner appealed to the court of appeals, the government made a motion to affirm, the motion coming before a division consisting of Judges Bastian, Danaher and Fahy. That division ordered that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal (*i.e.*, Judges Bastian, Danaher and Edgerton). That division affirmed the order of the district court, Judge Edgerton not participating. A petition for rehearing *en banc* was denied.

Petitioner admits that under 28 U.S.C. 46(d) two judges of a three-judge panel of a court of appeals constitute a quorum. He argues, nevertheless, that it violated the "spirit" of the statute to refer the motion to affirm to the same panel that had decided his original appeal because it must have been known that Judge Edgerton would not participate.

Petitioner's contention concerns a matter involving the internal managment of the business of the court of appeals. As such, it is not a question which warrants review by this Court. In this case particularly, where petitioner's argument on the second round of judicial review is in large measure predicated on the opinion

written by this panel of the court of appeals on the first round (see the petition in No. 39), it was obviously good management to send the cause to the panel which was familiar with the case.

As to the other issues raised in the petition in No. 39 and repeated but not argued by petitioner here, the government rests on its response heretofore filed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE 1962

IN THE

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OCTOBER TERM, 1962

Nos. 39 & 293

JOSE MARIA CASTELUM-QUINONES,
Petitioner,

v.

ROBERT F. KENNEDY, *Attorney General of the United States.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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JOSEPH FORER
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Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CASES CITED

STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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Petitioner,

v.

ROBERT F. KENNEDY, *Attorney General of the United States*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINION BELOW

The court below issued no opinion. Its opinion in a prior litigation involving the petitioner is reported at *Castelum-Quinones* v. *Rogers*, 286 F. 2d 824, and is reproduced in the record at R15-22.

JURISDICTION

The judgment of the Court of Appeals in No. 39 was entered on September 13, 1961 (R. 48), and the petition for certiorari was filed on October 27, 1961. In No. 293, the judgment of the Court of Appeals was entered on February 23, 1962 (R. 52). A timely petition for rehearing was filed on March 9, 1962 (R. 53-55) and denied on May 7, 1962 (R. 55). The petition for certiorari was filed on August 1, 1962. Both petitions were granted on October 15, 1962 (R. 75). The jurisdiction of the Court rests on 28 U.S. Code, sec. 1254(1).

STATUTES INVOLVED

(1) Section 241 (a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> "(6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * *
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

(2) Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

(3) 28 U. S. Code, sec. 46, provides:

"(a) Circuit judges shall sit on the court and its division in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce, and could not have previously introduced, was not material, when petitioner's deportation had been previously sustained by the Court of Appeals because of the absence of such evidence.

2. Whether the Court of Appeals erred, and in effect denied petitioner judicial review, because after it had affirmed the deportation order on a misconstruction of the statute which eliminated judicial evaluation of the evidence according to standards established by deci-

sions of this Court, it then sustained the refusal of the Board of Immigration Appeals to allow petitioner to prove that he was not deportable even under the court's construction.

3. Whether, in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and *Scales* v. *United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."

4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

5. Whether the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46, by transferring petitioner's appeal from the three-judge panel to which it was orginally assigned to a panel of which it was clearly predictable that only two of the three judges would participate, and of which only two did participate.

STATEMENT OF THE CASE

Petitioner, a Mexican national, has resided in the United States since he entered the country in 1920 at the age of 10. He is married and supports his wife, who resides in the United States. He has two American-born children and eight American-born grandchildren who live in this country (R. 40). He was ordered deported on a finding that he had been a member of the Communist Party in 1949 and 1950 and hence was deportable under section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S. Code, section 1251 (a)(6)(C) (R. 1-4).

Two witnesses testified in support of the charge of past Communist Party membership. Daniel Scarletto testified that he had seen petitioner at about fifteen Party meetings in 1949 and 1950, some of which may not have been closed meetings, and had collected dues from the petitioner (R. 66-7, 71-4).[1] Fabian Elorriaga also testified that he had seen petitioner at Party meetings. At one point he testified that he had seen petitioner at three or four meetings a month over the three year period of 1949 to 1951. At another he testified that he only recalled petitioner attending two or three meetings in toto (R. 69-71). The Board of Immigration Appeals (hereafter BIA) did not resolve this conflict in Elorriaga's testimony, stating that the inconsistency was immaterial since under either version petitioner was a "member of the Communist Party" (R. 4).

This was the sole evidence on the subject of membership. The government introduced no evidence on the nature of petitioner's membership or that he had ever engaged in any Party activity, or that he had ever said anything at Party meetings.[2] The finding upon which the order of deportation was based was set forth by the BIA as follows (R. 6):

> "Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the

[1] The pertinent portions of the direct examination of the witness Scarletto appear in the record at 58-67. Pertinent portions of the cross-examination appear at 71-74.

[2] The BIA noted that Scarletto, the witness upon whom the BIA principally relied, "observed the [petitioner] over a reasonable period of time" (R. 2). Still, Scarletto did not testify to any activity on the part of petitioner.

respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness Elorriaga."

On this basis the BIA held, on November 14, 1957, that petitioner was deportable under section 241(a)(6)(C) of the Immigration and Nationality Act (R. 1-4). Thereafter, petitioner moved the BIA for reconsideration in the light of *Rowoldt* v. *Perfetto*, 355 U.S. 115, decided on December 9, 1957 (R. 5). On May 12, 1958 the BIA granted this request and ordered the deportation hearing reopened, stating in part as follows:

> Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. . . . Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it (R. 7).
>
> "Normally, reopening would be denied. However, we shall reopen proceedings because we believe it to be in the best interest of both the government and alien. If judicial review is sought in this case and the court declares that we are wrong in our evaluation of *Rowoldt*, the Service, if it has evidence bearing on the nature of the respondent's membership, will be required to bring new proceedings, and the respondent will be faced with the prospect of defending himself before the administrative authorities and perhaps again seeking judicial review. . . . *There was little development of the respondent's awareness of the fact that he belonged to a political organization.*" (R. 8, emphasis supplied.)

At the reopened hearing no additional evidence was introduced by either side. Petitioner's counsel took the position that it was the government's burden to prove that petitioner's membership in the Party was more than nominal, and that in the absence of such proof, the government had failed to make out a case and there was no burden on the petitioner to go forward. (R. 9-12). The Special Inquiry Officer again held petitioner deportable, and on appeal the BIA affirmed, stating (R. 14):

> "The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning."

Petitioner then brought suit in the United States District Court for the District of Columbia to challenge the validity of the deportation order and the BIA's theory that once nominal membership had been shown, a meaningful association would be presumed unless the alien came forward and demonstrated the contrary. The District Court gave judgment for the government, and on appeal the Court of Appeals affirmed (per Judges Danaher and Bastian, Judge Edgerton not participating). *Gastelum-Quinones v. Rogers*, 286 F. 2d 824 (R. 15-22).

The Court of Appeals held, on that appeal, that once bare organizational membership in the Communist Party was established by the government, the alien was deportable unless he came forward and rebutted a presumption arising from the organizational membership. To this extent the court's holding was the same as the BIA's. But where the court departed from the BIA was as to the fact which was presumed. The court's holding on this subject was novel and unprecedented.

The court reasoned as follows: (1) The statute providing for the deportation of members of the Communist Party rests on (a) a legislative finding that the Communist Party espouses violent overthrow of the government and (b) a legislative presumption that members of the Communist Party personally espouse this doctrine of their organization. (2) Both the finding and the presumption are reasonable and valid. (3) The holding of the *Rowoldt* case was that *this presumption that members of the Party personally advocated violent overthrow* was rebuttable. (4) In petitioner's case, the government, therefore, had made a prima facie showing merely by showing voluntary organizational membership; and since petitioner had not introduced evidence that he had not personally espoused violent overthrow, the deportation order was correct.

Until this decision came down, neither petitioner nor the Immigration and Naturalization Service had supposed, or had had any basis for supposing, that it was a defense to the deportation of a former member of the Communist Party that he had not personally adhered to violent doctrine. On the contrary, the petitioner and the Service had shared the view that the crucial question was not personal belief in violence, but the extent of the member's participation, no matter how innocent, in Party affairs. This view is, of course, that established by *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; and *Rowoldt* v. *Perfetto*, *supra*. The issue on which petitioner and the Service had differed was on the locus of the burden of proof—whether the government had to prove the requisite degree of participation in Party affairs, all of which might be lawful and peaceable, or whether

the alien had to disprove it, once simple membership had been established.

Superficially, the Court of Appeals resolved this controvery by holding that the burden of proof was on the alien on the issue of whether his membership was of such a kind as to be cause for deportation. But the court reached this result by the road of analyzing the statute and this Court's decisions as creating a rebuttable presumption that a member personally advocated violence. There is no way of knowing how the court would have come out on the burden of proof issue if it had realized that its premises and analysis were wrong, and that whether or not membership was deportable depended on something other than personal espousal of violent doctrine.

Petitioner then petitioned this Court for certiorari (No. 711, Oct. Term, 1960). We pointed out in the petition that the Court of Appeals had formulated a rule, never before enunciated, that deportable membership was presumed, prima facie, from a showing of bare membership, and that the alien had the burden of disproving the presumption. We asserted that this presumption was at odds with *Rowoldt;* that at the very least *Rowoldt* had not settled the question as to the locus of the burden of proof on the question of meaningful membership; that the Court of Appeals had reached its conclusion on the basis of a faulty analysis of the statutory and case law; and that it was important that the issue as to the burden of proof be settled by this Court.

The government's opposition represented — with thorough inaccuracy—that the Court of Appeals had not created any new rule of law and that all that was

involved was a factual issue turning upon the evaluation of testimony. Certiorari was denied. 365 U.S. 871.

The net result was that, under the law of petitioner's case established by the Court of Appeals decision, petitioner was being deported on the basis of a rebuttable presumption that he had personally advocated violent overthrow, although neither he nor the Service had known or had reason to know that he could have rebutted this presumption, and thus establish non-deportability, by showing that despite his membership he had not so advocated.

In the face of this manifest injustice, petitioner filed a motion with the BIA requesting that the deportation proceeding be reopened so as to give him an opportunity to prove that he had never advocated or espoused violent overthrow, and thus was not deportable under the view taken by the Court of Appeals in his case. He pointed out that neither he nor the Service had previously known, or could reasonably have known, that such evidence was relevant, much less crucial. He supported his motion with an affidavit that he had never advocated or espoused violent overthrow; that he had never had any knowledge or belief that such advocacy was a tenet of the Communist Party; that he had always desired that changes should be accomplished by peaceable and constitutional means; and that if the deportation hearing were reopened he would so testify. (R. 22-27)

The BIA, after hearing oral argument, denied the motion, on the ground that the evidence which petitioner offered in his motion for reopening was not material to deportability. This was inconsistent with

the opinion of the Court of Appeals in petitioner's case. The BIA resolved this difficulty by refusing to believe that the court could have meant its assertions that the presumption to be rebutted was that a member espoused violent doctrine, since those assertions were contrary to this Court's decisions in *Galvan* and *Rowoldt*, *supra*. At the same time, the BIA relied on the court's decision as sustaining the BIA theory that deportable membership would be presumed from a showing of bare membership, unless rebutted by the alien (R. 27-32). Thus the BIA regarded the decision of the Court of Appeals as having created a rule of law—although the government had represented the contrary in its opposition to certiorari.

The BIA also rejected petitioner's argument that the case should be reopened because of the light thrown on the meaning of membership in the Communist Party by *Scales* v. *United States*, 367 U.S. 203, decided after the Court of Appeals had issued its decision in petitioner's case (R. 31).

Petitioner then filed the complaint which initiated the present litigation, challenging the validity of the BIA's denial of his motion to reopen (R. 32-36). The District Court denied a preliminary injunction (R. 41-47) and the Court of Appeals summarily affirmed the denial without opinion, per Judges Danaher and Bastian (R. 48). This decision is the subject of our petition for certiorari in No. 39.

Thereafter the District Court granted summary judgment in favor of respondent and dismissed the complaint (R. 50). Petitioner appealed this judgment to the Court of Appeals, and the respondent moved to affirm. The motion came before a division consisting

of Circuit Judges Fahy, Danaher and Bastian. This division ordered *sua sponte* that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal contesting the validity of the deportation order (R. 51). That division had consisted of Judges Edgerton, Danaher and Bastian, but Judge Edgerton had not participated. (See *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824, R. 15.) Furthermore, the affirmance of the denial of the preliminary injunction had also been by only two judges, Judges Danaher and Bastian (R. 48).

The division to which the motion had been referred then summarily affirmed the judgment of the District Court. This decision is the subject of our petition for certiorari in No. 293. The court's order of affirmance recited, "Circuit Judge Egerton took no part in consideration of the above motion." (R. 52.)

Petitioner then filed a petition for rehearing by the court en banc (R. 53-55). The petition pointed out that because of Judge Edgerton's repeated non-participation, "each of appellant's three appeals had been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate." The petition submitted that in view of the unsual situation, the only practicable method by which petitioner could have the benefit of consideration by more than two judges, in accordance with the intention of 28 U.S. Code, sec. 46, was to have the case reheard en banc. On May 7, 1962, the court denied the petition for rehearing (R. 55).

SUMMARY OF ARGUMENT

I.

In the original appeal, the Court of Appeals upheld the order of deportation on the theory that the Act creates a presumption that a member of the Communist Party personally espouses the doctrine of violent overthrow of the government attributed to that Party. It held that this presumption is rebuttable by the alien, and that if rebutted, the alien is not deportable. Under this rule of law laid down by the Court of Appeals, petitioner is not a deportable alien on the basis of the evidence he offered to present to the Immigration Service.

The BIA, however, took the position that the evidence offered by the petitioner was immaterial under the decisions of this Court and it refused to follow the law of the case as laid down by the Court of Appeals. But it was not at liberty to do so, since the rule laid down by the Court of Appeals was binding upon both the lower court and the BIA as the law of the case. The fact that the reasoning of the Court of Appeals was inconsistent with decisions of this Court did not give the BIA leeway to pick and choose which portions of the appellate court's opinion it would follow. Moreover, as we show below, the view of the Court of Appeals that the alien had the burden of proof is also inconsistent with the decisions of this Court. The law of the case rule would be stultified if a lower adjudicatory body may select as authoritative those portions of an appellate court ruling of which it approves, while rejecting those portions which it disapproves.

Since it was not open for the BIA to disregard the law of the case as laid down by the Court of Appeals,

it was erroneous for the District Court to hold the BIA action justified. Accordingly, both the BIA and the District Court erred in holding petitioner deportable because by so holding they disregarded the law of the case as established by the Court of Appeals in a prior decision.

When the case returned to the Court of Appeals, the court had two options. It could have reversed the District Court and thus the BIA, for failing to apply the law of the case as established by the intitial decision of the Court of Appeals. Or, if it realized that the initial decision was based on a palpably erroneous theory and analysis, the court could have discarded its prior ruling and reexamined the case to determine whether petitioner was deportable under a correct view of the law. The Court of Appeals, however, took neither of these only two permissible courses. Instead, summarily and without explanation, it affirmed the BIA's refusal to reopen. For all practical purposes, although petitioner has now had three Court of Appeal decisions that he is deportable, he has been denied judicial review in any realistic sense.

II.

Rowoldt v. *Perfetto* held that the statutory provision for deporting past "members" of the Communist Party applied only to membership which had a certain political significance described as a "meaningful association." In the present case, the evidentiary findings on membership, which were less than those in *Rowoldt*, were insufficient to support deportability. In the subsequent case of *Scales* v. *United States*, this Court held that the term "member" of the Communist Party applied only to "active" members. The BIA findings cannot justify a holding of "active" membership by the petitioner.

The BIA compensated for the lack of proof of deportable membership by holding that once a bare, organizational membership had been shown, the burden of proof shifted to the alien to show that his membership was not a "meaningful association." It justified the holding by asserting that an "inference" of meaningful association "normally follows from the joining and association with a political party." The BIA ruling is unsound in principle, contrary to precedent, and inconsistent with experience.

The burden of proving that a resident alien is within a deportable class is squarely upon the government. The deportable class in this case is a member whose membership was a "meaningful association" or "active." This burden was clearly not carried by showing something substantially less, a bare organizational membership. *Rowoldt* itself refused to infer a "meaningful association" from any lesser showing or any "normal" situation.

Experience does not sustain the BIA view that there is a normal inference that membership in the Communist Party is a meaningful association within the doctrine of *Rowoldt*. It has been found in a number of cases that the evidence, though establishing Party membership, did not support deportation under this test. In view of the resources at the government's command and its notorious close surveillance of the Communist Party, the government's inability to prove more than nominal membership indicates that there was nothing more to prove. The failure of the government witnesses who observed the petitioner in the Party to testify that he did anything more than attend some meetings and pay dues is a strong indication that his participation in the Party was of slight significance.

The deportation statute provides that "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Under this test and under section 10 of the Administrative Procedure Act, administrative orders may not be based upon evidence which merely creates a suspicion of the fact to be proved or which gives equal support to inconsistent inferences. Moreover, no other court decision applying *Rowoldt* has placed on the alien the burden of proving that his membership was not a meaningful association. The harsh nature of the statute necessitates holding the government to strict standards of proof.

III.

The failure of the Court of Appeals to accord petitioner any meaningful judicial review was aided and compounded by its peculiar course in assigning judges to the division which determined petitioner's appeals. The initial appeal was decided by only two judges and the second appeal, that from the denial of a preliminary injunction, was decided by the same two judges which disposed of the first. The third appeal was assigned to a new division which *sua sponte* transferred the case to the division which had decided the first two appeals. As anticipated, Judge Edgerton, the third member of that division, who had previously twice abstained, abstained again. Thus the transfer order was not to a division of three judges but to the same two judges who had, in the original decision, misunderstood the applicable deportation law.

This course violated the spirit of 28 U.S. Code section 46. That section requires that an appeal be determined by a division of three judges or by the full

court. While it provides that two judges shall constitute a quorum of a three-judge division, the basic intention is that decisions shall be by three judges. This intention was vitiated by a transfer which guaranteed that only two judges would participate. Moreover, the two judges who did participate simply washed their hands of the matter, the new appeal being decided summarily and without explanation. This process did not comport with the proper administration of justice.

ARGUMENT

I. THE BIA AND THE DISTRICT COURT ERRED BECAUSE THEY DID NOT APPLY THE LAW OF THE CASE ESTABLISHED BY THE COURT OF APPEALS. THE COURT OF APPEALS ERRED BECAUSE IT NEITHER FOLLOWED THE LAW OF THE CASE NOR REEXAMINED THE CORRECTNESS OF ITS ORIGINAL HOLDING

A. The First Decision of the Court of Appeals Established as the Law of the Case that Petitioner was not Deportable if He Could Rebut a Presumption, Arising from Communist Party Membership, that He had Personally Espoused Violence. Accordingly, the BIA and the District Court Erred, in Denying Petitioner the Opportunity to Rebut the Presumption.

In the original appeal, the Court of Appeals upheld the order of deportation on the theory that the Act creates a presumption that a member of the Communist Party personally espouses the doctrine of violent overthrow of the government attributed to that Party. It held that this presumption is rebuttable by the alien, and that if rebutted, the alien is not deportable. As the court stated in its opinion (emphasis supplied):

> "*The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation pro-*

ceding by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party and (3) *the presumption that a member of a political organization espouses the tenets of the organization.*

"In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the 'meaningful association' required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan. Rather, we think that Rowoldt amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.*

"Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. *Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a prima facie case by proving voluntary membership.*" (286 F. 2d at 828; R. 21.)

Petitioner filed a petition for rehearing with the Court of Appeals in which he expressly argued that the Court's analysis of the deportation statute as creating a rebuttable presumption of personal advocacy was erroneous. The court denied the petition for rehearing, thereby adhering to the analysis set forth in its opinion. Petitioner then petitioned for certiorari to this Court (No. 711, October Term, 1960). Cer-

tiorari was denied, 365 U.S. 871, thus leaving the opinion of the Court of Appeals as the rule of law in petitioner's case.

If, as the Court of Appeals held, deportability hinges on a rebuttable presumption, derived from Party membership, that the alien personally espoused violent overthrow, then testimony by the alien that he never personally so espoused and was never aware that the Communist Party had any such tenet is obviously relevant and material to rebut the presumption. Indeed, such evidence may be crucial, for if believed, it rebuts the presumption and defeats deportation. Accordingly, under the rule of law laid down by the Court of Appeals, petitioner is not a deportable alien on the basis of the evidence he offered to present to the Immigration Service.

The BIA, however, took the position that the evidence offered by the petitioner was immaterial under the decisions of this Court. Accordingly, it refused to follow the law of the case as laid down by the Court of Appeals. But it was not at liberty to do so. For whether the rules laid down by the Court of Appeals were correct or incorrect, they were binding upon both the lower court and Board of Immigration Appeals as the law of the case. *Insurance Group Comm.* v. *Denver & R.G.W.R. Co.*, 329 U.S. 607; *Re Sanford Fork & Tool Co.*, 160 U.S. 247. This law of the case was established not by the narrow holding of the appellate court, i.e., affirmed or reversed, but by its opinion and its reasoning. As stated in *Thompson* v. *Maxwell Land Grant & R.R. Co.*, 168 U.S. 451, 456:

> "It is the settled law of this Court, as of others, that whatever has been decided on one appeal or

> writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.
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> "We take judicial notice of our own opinions and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, on what grounds the judgment was rendered and what has become settled for future disposition of the case."

Hence, the BIA erred in holding that the Court of Appeals decision made petitioner deportable because he had not rebutted a presumption arising from the Government's *prima facie* case of bare membership, while at the same time rejecting as erroneous the Court of Appeals ruling as to the nature of that presumption and the character of the evidence relevant to rebut the presumption.[3] The fact that the reasoning of the Court of Appeals was inconsistent with decisions of this Court did not give the BIA leeway to pick and choose which portions of the appellate court's opinion it would follow. For the law of the case established by the superior tribunal was binding on the inferior tribunal whether right or wrong. Moreover, as we show below, the view of the Court of Appeals that the alien must carry the burden of proof as to an essential element of

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[3] There is no issue posed here as to whether the petitioner's offer of rebuttal evidence came too late, since the decision of the BIA rested upon the ground that the evidence which petitioner offered was irrelevant and not that the offer was tardy (R. 31). Moreover, rejection of the evidence on the ground that it was tardily offered would have been a gross abuse of discretion. As petitioner's motion to reopen shows (R. 23, 27), and as the BIA decision demonstrates, prior to the Court of Appeals decision, petitioner was fully justified in believing that evidence of his personal non-espousal of violent doctrine was not relevant and would not be admitted at the deportation hearing.

deportability is also inconsistent with the decisions of this Court. The law of the case rule would be stultified if a lower adjudicatory body may select as authoritative those portions of an appellate court ruling of which it approves, while rejecting those portions which it disapproves.

Nor could it be assumed that the Court of Appeals would have arrived at the same result if it had correctly analyzed the statutory scheme and the decisions of this Court. The Court of Appeals believed that the statutory scheme was constitutionally valid because it rested on a premise of the alien's personal advocacy of force and violence, misreading this Court's decision in *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Had the court appreciated that the statutory scheme was much harsher than it supposed, since it made the alien's personal advocacy irrelevant to the issue of deportability, it is by no means certain that the court would have made the statute even harsher by shifting the burden of proof as to the character of membership in the Party from the government to the alien. In fact the court placed the burden on the alien only on the assumption that he could carry the burden by evidence that he did not personally advocate the violent overthrow of the government.[4]

Since it was not open for the BIA to disregard the law of the case as laid down by the Court of Appeals, it

[4] We do not mean to imply that the court was justified in shifting the burden to the alien even under its view of the statute. At least in the absence of an express congressional declaration, and there is none here, there is no warrant for shifting the burden of proving any element of deportability from the government to the alien, see *infra* p. 28. The point is merely that the Court of Appeals decision must be taken as it was rendered. Since its premise and reasoning were incorrect, it does not follow that it would have reached the same result on the basis of correct premises and reasoning.

was erroneous for the District Court to hold the BIA action justified. Accordingly, both the BIA and the District Court erred in holding petitioner deportable because by so holding they departed from the law of the case established conclusively for them by the first decision of the Court of Appeals.

B. When the Case Returned to the Court of Appeals, It Erred Because It Neither Applied the Law of the Case nor Reexamined the Correctness of Its Earlier Holding

In the District of Columbia Circuit, as elsewhere, the Court of Appeals will normally adhere to its prior decision in the same litigation as establishing the law of the case, without reexamining the merits of the original holding. However, the law of the case rule is a rule of practice, not a limitation on the court's power, and the court will disregard the rule when, but only when, "a clear case . . . [is] . . . presented showing that the earlier adjudication was plainly wrong and that application of the rule would work manifest injustice." *Mayflower Hotel Stockholders Protective Committee* v. *Mayflower Hotel Corp.*, 193 F. 2d 666, 669; *Brown* v. *Gesellschaft Fur Drahtlose Tel.*, 104 F. 2d 227, 228; *Davis* v. *Davis*, 96 F. 2d 512; *Messinger* v. *Anderson*, 225 U.S. 436, 444.

Accordingly, when the case returned to the Court of Appeals, the court had two options. It could have reversed the District Court, and thus the BIA, for failing to apply the law of petitioner's case as established by the initial decision of the Court of Appeals. Or, if it realized that the initial decision was based on a palpably erroneous theory and analysis, the court could have discarded its prior ruling and reexamined the case to determine if petitioner was deportable under the

correct view of the law. Such a reexamination should, as our next section demonstrates, have resulted in a setting aside of the deportation order.

The Court of Appeals, however, took neither of these only two permissible courses. Instead, summarily and without explanation, it affirmed the BIA's refusal to reopen. The court first did so on the appeal of the District Court's denial of a preliminary injunction, and it repeated this action on the appeal from the summary judgment on the merits. For all practical purposes, although petitioner has now had three Court of Appeals decisions that he is deportable, he has been denied judicial review in any realistic sense. On the first occasion, the court affirmed on an erroneous theory which it had devised *ex mero motu*, neither party having suggested it. On the next two occasions, the court failed both to enforce its original theory or to reexamine the case on a correct theory. The net result is that petitioner has received only the detriment and none of the benefit of either the court's view of the law or the correct view of the law. Under the former he is not deportabe because he was never given an opportunity to rebut the court's rebuttable presumption of personal espousal of violence. Under the latter he is not deportable because the Service never proved he was a member of a deportable class. We now turn to a demonstration of this.[5]

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[5] The original decision of the Court of Appeals does not, of course, establish the "law of the case" for this Court. *Messenger* v. *Anderson*, *supra*. We submit, therefore, that the most appropriate course would be for this Court to examine the validity of the deportation order on the basis of the correct applicable premises, without regard to the erroneous reasoning of the court below.

II. UNDER A CORRECT VIEW OF THE LAW, PETITIONER IS NOT DEPORTABLE BECAUSE THE SERVICE FAILED TO PROVE THAT HIS MEMBERSHIP IN THE COMMUNIST PARTY WAS A "MEANINGFUL ASSOCIATION" OR "ACTIVE."

A. The Service's Evidentiary Findings Show Only a Bare Organizational Membership

Rowoldt v. *Perfetto*, 355 U.S. 115, held that the statutory provision for deporting past "members" of the Communist Party applied only to membership which had a certain political significance described as a "meaningful association." Aliens whose membership was only "nominal"—i.e., which did not reach the "meaningful association" standard—are not deportable.

In the present case, the evidentiary findings on membership consist exclusively of findings of attendance at an unknown number of closed Party meetings (less than fifteen, see *supra* p. 5), and payment of Party dues. These findings obviously do not approach those which *Rowoldt* held insufficient to support deportability. For in *Rowoldt*, the alien belonged to the Communist Party for about a year, attended closed Party meetings, paid dues, ran a Party bookstore (355 U.S. at 116-18), and had a "considerable, albeit rudimentary knowledge of Communist history and philosophy." (355 U.S. at 125, dissenting opinion). In the present case, the BIA overstated the situation when it observed (R. 8), "There was little development of [petitioner's] awareness of the fact that he belonged to a political organization." There was, in fact, no development of any such awareness.

Moreover, the *Rowoldt* doctrine has been extended by the Court so as to circumscribe even further the meaning of Communist Party membership. *Scales* v.

United States, 367 U.S. 263, held that the term "member" applied only to "active" members. While this was a criminal prosecution for violation of the Smith Act's membership clause, the Court relied on *Rowoldt* and the preceding deportation case of *Galvan* v. *Press*, 347 U.S. 522, as justifying this meaning for membership. The Court stated (at 222):

> "We decline to attribute to Congress a purpose to punish nominal membership . . . not merely because of the close constitutional questions that such a purpose would raise . . ., but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act. Nor can we assume that it was Congress' purpose to allow the quality of the punishable membership to be measured solely by the varying standards of that relationship as subjectively viewed by different organizations. It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself, thereby assuring an even-handed application of the statute.
>
> "This Court in passing on a similar provision requiring the deportation of aliens who have become members of the Communist Party—a provision which rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality as this enactment—had no difficulty in interpreting 'membership' there as meaning more than the mere voluntary listing of a person's name on Party rolls. *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115 . . . A similar construction is called for here."

In line with this reasoning the Court sustained a charge to the jury by the trial court reading as follows (at 255, ftn. 29):

> "The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member. It must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

The Court's reasoning in *Scales*, as well as its citation of *Rowoldt and Galvan*, indicate that the term "member" in the deportation statute means the same as "member" in the Smith Act. The same considerations apply in both situations, namely, the constitutional questions posed by a contrary interpretation, the probabilities that Congress did not intend so harsh a statute to be applied to mere passive members, and the desirability of an "objective standard fixed by the law itself, thereby assuring an even-handed application of the statute." Moreover, both the deportation provision and the Smith Act provision trace their original source to the same statute, the Alien Registration Act of 1940, 54 Stat. 670 ff. It would be illogical to assume that Congress meant the same word to have different meanings when employed in different sections of the same statute.

It is not necessary, in the present case, to go as far as the trial court in *Scales*, so as to hold that in order for the government to prove membership it had to show that petitioner "devoted all, or a substantial part, of his

time and efforts to the Party." For present purposes, it is sufficient to apply the rule that petitioner is not deportable unless he was an "active" member. For the BIA findings cannot justify a holding of "active" membership by the petitioner regardless of what content is imparted to that term. The BIA found only bare membership as evidenced by petitioner's attendance at meetings and payment of dues.[6] The establishes neither the "meaningful association" required by *Rowoldt* nor the "active" membership required by *Scales*.

B. "Meaningful Association" or "Active" Membership May Not Legitimately be Inferred From a Showing of Bare, Organizational Membership

The BIA compensated for the lack of proof of deportable membership by holding that once a bare, organizational membership had been shown, the burden of proof shifted to the alien to show that his membership was not a "meaningful association." It justified the holding by asserting that an "inference" of meaningful association "normally follows from the joining and association with a political party" (R. 7). The BIA's ruling is unsound in principle, contrary to precedent, and inconsistent with experience.

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[6] In its opposition to the petition for certiorari in No. 39 (R. 520, Oct. Term, 1961), the government misrepresented that there was "evidence . . . that petitioner was an active . . . member of the Communist Party" (at p. 8). But it is not necessary for the Court to examine the evidence, since it is plain that the BIA made no such finding, but found only bare organizational membership, which, it considered, made out a *prima facie* case shifting the burden to petitioner. The Court is limited to reviewing the case on the basis of the findings and analysis made by the administrative agency and not on a new basis offered by counsel on appeal. "The courts may not accept appellate counsels' *post hoc* rationalization for agency action." *Burlington Truck Lines, Inc., et al. v. United States et al.*, 371 U.S. 156, 168-9; see also *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 196.

That the burden of proof of deportability rests upon the Service has heretofore been unquestioned. *Kimm* v. *Rosenberg*, 363 U.S. 405, 412-13 (dissenting opinion);[7] *Chew* v. *Rogers*, 257 F. 2d 606; *Zitó* v. *Mountal*, 174 F. Supp. 531, 538. The deportable class in this case is that of members whose membership was a "meaningful association" or "active." This burden is clearly not carried by showing something substantially less, namely, a bare organizational membership. In this very case, the BIA's own statement that "There was little development of the [petitioner's] awareness of the fact that he belonged to a political organization," shows that the burden was not carried. And this statement, as we have seen, was an exaggeration.

Rowoldt itself refused to infer a "meaningful association" from any lesser showing or "normal" situation. It stated that, "There must be a substantial basis for finding" meaningful membership, and that a "solidity of proof . . . is required." (355 U.S. at 120). *Rowoldt* did not set aside the deportation order on a finding that Rowoldt's membership *was* without political significance, but on a finding "that the dominating impulse to his 'affiliation' with the Communist Party *may well have been* wholly devoid of any 'political' implications" (at 120, emphasis supplied).

Experience does not sustain the BIA's view that there is a normal inference that membership in the Communist Party is a meaningful association within

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[7] "It has not been, and scarcely could be, controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings the deportability of an alien; whatever the exceptions to the rule may be, it was established by the time relevant here that where post-entry misconduct is charged as the basis for deportability, the burden is the Government's."

the doctrine of *Roncoldt*. The large flow of persons in and out of the Communist Party in past years indicates the contrary. So does *Roncoldt* and other cases in which it was found that the evidence, though establishing Party membership, did not support deportation. *E.G., Diaz v. Barber*, 261 F. 2d 300; *Martinez v. Rogers*, Dist. Ct. D.C., Civil No. 1538-59, decided Dec. 7, 1959; *Matter of Grondahl*, A-5192494 and A-5187131, decided by BIA June 12, 1959. In view of the resources at the government's command and its notorious close surveillance of the Communist Party, the government's inability to prove more than mere organizational membership in a particular case indicates that there was nothing more to prove. In this very case the government produced two witnesses who observed petitioner in the Party.[8] Their failure to testify that he did more than attend some meetings and pay dues is a strong indication that his participation in the Communist Party was of slight significance.

Congress has expressly provided, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Immigration and Nationality Act, § 242(b)(4), 8 U.S. Code, § 1252(b)(4). This is a more rigorous test than the "substantial evidence" requirement of section 10 of the Administrative Procedure Act, 5 U.S. Code § 1009, which is also applicable to deportation orders, *Shaughnessy v. Pedreiro*, 349 U.S. 48. Yet even section 10 rules out administrative orders resting on evidence which merely creates a suspicion of the ultimate fact to be proved or which gives equal support to incon-

[8] As previously noted, the BIA commented that Scarletto, the witness upon whom the Bon d principally relied "observed the [petitioner] over a reasonable period of time" *supra* ftn. 2.

sistent inferences. *N. L. R. B.* v. *Columbian E. & S. Co.*, 306 U.S. 292, 300; *Appalachian Elec. Power Co.* v. *N. L. R. B.*, 93 F. 2d 985, 989; *Zito* v. *Moutal*, 174 F. Supp. 531, 537-38; see *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229. Since the Board's "normal inference" was drawn from evidence which could just as well have supported a contrary inference, it did not satisfy the substantial evidence requirement.

Moreover, no other court decision applying *Rowoldt* has placed on the alien the burden of proving that his membership was not a meaningful association. Instead, the reviewing courts have determined whether meaningful association was or was not established by the totality of the evidence in the record. *Niukkanen* v. *McAlexander*, 265 F. 2d 825 (9th Cir.), aff'd 362 U.S. 390; *Diaz* v. *Barber*, 261 F. 2d 300 (9th Cir.); *McKay* v. *McAlexander*, 268 F. 2d 35 (9th Cir.); *Schleich* v. *Butterfield*, 252 F. 2d 191 (6th Cir.), cert. den. 358 U.S. 814; *Williams* v. *Mulcahey*, 253 F. 2d 709 (6th Cir.), cert. den. 356 U.S. 946; *Wellman* v. *Butterfield*, 253 F. 2d 932 (6th Cir.). As the Ninth Circuit stated in *Niukkanen* (265 F. 2d at 828):

> "The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words 'meaningful association' as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration."

Similarly, the government's brief in *Niukkanen* in this Court observed:

> "And all lower court rulings since *Rowoldt* have considered the total evidence in determining

whether there was *substantial basis* for a finding of consciousness by the alien that he was joining an organization known as the Communist Party which operates as a distinct and active political organization." (Brief in No. 130, Oct. Term 1959, p. 22, emphasis supplied.)

In the present case neither the BIA nor the court below applied this test. If they had, since the evidence showed even less than was present in *Rowoldt*, they would necessarily have found that the government had failed to carry its burden of proving a "meaningful association."

It is true that in *Rowoldt*, unlike here, the alien described the nature of his membership in a prehearing interview (though standing mute at the deportation hearing). But this supplies no warrant for requiring an exculpatory statement from the alien before the *Rowoldt* doctrine is applied. The important thing is the nature of the evidence, not its source. Whatever the source, the burden of proof is on the Service. Rowoldt defined what had to be proved in order to establish deportable membership. But there is nothing in the opinion that implies a novel rule as to the source or the burden of proof.

The need to hold the government to strict standards of proof is emphasized by the nature of the statute. The Communist deportation provisions impinge on human rights with dubious offsetting social advantage. The harshness and unfairness of the statute was noted in the very decision which sustained it (*Galvan* v. *Press*, 347 U.S. 522, 530), and the statute's "constitutionality was upheld here only on historical grounds" (*Kimm* v. *Rosenberg*, 363 U.S. 405, 415, dissenting

opinion).[9] If the deportation order against petitioner is sustained, he will be banished after forty-two years of residence in the United States, where he has lived since he was ten years old, and will be separated from his wife, his children, his grandchildren and his economic roots. These consequences have been decreed for nothing more than conduct which was innocuous, non-criminal and constitutionally protected—attendance at some Communist Party meetings and payment of dues. And one may be sure that the attenuation of the standards of proof in this political deportation case will have a corresponding effect in non-political cases.

Expulsion of an alien from the society to which he was admitted and by which he has been assimilated is comparable in its nature and consequences to the denaturalization of a citizen. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231; *Galvan* v. *Press*, 347 U.S. 522, 530; *Trop* v. *Dulles*, 356 U.S. 86, 98. Indeed, one of the harshest features of denaturalization is that it may subject the individual concerned to deportation. See *Trop* v. *Dulles*, *supra* at 102. Because of the harsh consequences, this Court has established the requirement in expatriation and denaturalization cases that the government must prove its case by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.' " *Perez* v. *Brownell*, 356 U.S. 44, 47; *Schneiderman* v. *United States*, 320 U.S. 118, 158. A like concern for human rights forbids deportation on the flimsy evidence in this record.

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[9] Moreover, it appears that *Galvan* misread the history. See Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L. J. 1578, 69 Yale L. J. 262 (two articles), particularly 69 Yale L. J. at 287-89.

III. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE OF THE FAILURE OF THE COURT BELOW TO MAKE THREE JUDGES AVAILABLE

The failure of the Court of Appeals to accord petitioner any meaningful judicial review was aided and compounded by its peculiar course in assigning judges to the division which determined petitioner's appeals. The initial appeal was decided by only two judges (Danaher and Bastian), the third (Edgerton) not participating for unstated reasons. The second appeal, that from the denial of a preliminary injunction, was decided by the same two judges which disposed of the first. The third appeal was assigned to a new division, consisting of Judges Fahy, Danahar and Bastian. This division *sua sponte* transferred the case to the division which had decided the first two appeals. (Supra, p. 12.) In view of the fact that Judge Edgerton had twice abstained, the transferring division must have known that he would again abstain, as in fact he did. Thus the transferring order was not to a division of three judges, but to the same two judges who had, in the original decision, so misunderstood the applicable deportation law.

This course violated at least the spirit of 28 U.S. Code § 46. That section requires that appeals be determined by a division of three judges or by the full court. While it provides, for obvious practical considerations, that two judges shall constitute a quorum of a three-judge division, the clear basic intention is that decisions shall be by three judges. This intention was vitiated by a transfer which guaranteed that only two judges would participate.

Thus a curious climax was supplied to this curious litigation. Petitioner is faced with a cruel and irra-

tional deprivation of his personal liberty. The deportation order against him is erroneous on principle and probably under the decisions of this Court. The order was sustained on the basis of an erroneous legal analysis conceived by the Court of Appeals entirely on its own. As a result, the court never reached the real issue in the case, namely, the burden of proof question which was not settled by *Rowoldt*. Nor did the court evaluate the evidence in the light of the *Rowoldt* standard. The BIA, incredulous that the court could have meant what it said, denied petitioner the opportunity to prove that he is not deportable even under the court's erroneous theory. In so doing, the BIA relied on that part of the court's decision which favored the government, while rejecting that part which favored petitioner. When the case came back to the Court of Appeals, and despite the later decision by this Court in *Scales*, the court simply washed its hands of the matter, the new appeals being decided summarily and without explanation and by the same two judges who had created the untenable situation. This process did not comport with the proper administration of justice.

CONCLUSION

The judgments below should be reversed with directions to enter judgment setting aside the deportation order and terminating the deportation proceeding.

Respectfully submitted,

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CITATIONS

674560—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 39 and 293

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The orders of the court of appeals (R. 48, 52) are not reported. The prior opinion of the court of appeals sustaining the validity of the order of deportation (R. 15–22) is reported at 286 F. 2d 824.

JURISDICTION

The judgment of the court of appeals in No. 39 was entered on September 13, 1961 (R. 48), and in No. 293 on February 23, 1962 (R. 52). In No. 293, a petition for rehearing *en banc* was denied on May 7, 1962 (R. 55). The petition for a writ of certiorari in No. 39 was filed on October 27, 1961, and the

petition in No. 293 on August 1, 1962. The petitions were granted on October 15, 1962 (R. 75). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals properly declined to reopen deportation proceedings a second time, in order to permit petitioner to testify that he did not personally advocate the overthrow of the government by force and violence.

2. Whether the evidence is sufficient to establish that petitioner is an alien subject to deportation because he had been, after entry into the United States, a "meaningful member" of the Communist Party.

3. Whether the court of appeals, in referring petitioner's case to the division of the court which had considered his original appeal, has denied petitioner judicial review because one judge, who initially did not sit, again failed to sit.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.

* * * * *

28 U.S.C. 46 provides:

§ 46. Assignment of judges; divisions; hearings; quorum.

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In such circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c) shall constitute a quorum.

STATEMENT

Petitioner, a native and national of Mexico, was ordered deported from the United States in 1957 on the ground that he was an alien who, after entry into this country, had been a member of the Com-

munist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act of 1952, *supra*. Subsequently, the Board of Immigration Appeals having reopened the hearings to permit petitioner to introduce new evidence, reaffirmed its order of deportation. The district court and court of appeals upheld this order, and this Court denied certiorari. In this, the third round of proceedings, petitioner moved the Board to reopen the deportation proceedings a second time to permit him to testify. This application was denied. Petitioner now seeks review of the judgment of the court of appeals which affirmed orders of the district court denying a preliminary injunction against his deportation and granting summary judgment for the Attorney General.

1. *The original proceedings.*—On March 23, 1956, petitioner, who had entered this country in 1920, was charged in a rule to show cause with being an alien who after entry had become a member of the Communist Party. From April 1956 to July 1956, five hearings were held before a special inquiry officer of the Immigration and Naturalization Service (R. 7).

The government's evidence showed that, at the time petitioner registered as an alien in 1940, he had stated that he had not belonged to any clubs, organizations, or societies. When the Service questioned him in 1953 concerning membership in the Communist Party, he refused to answer (R. 7).

Daniel Scarletto, a member of the Communist Party from 1947 to 1952, testified at the hearings that

he met petitioner in early 1949 at a meeting of the El Sereno Club, a unit of the Party consisting of 32 members (R. 59–60, 63). Attendance at El Sereno Club meetings was restricted to Party members and Scarletto saw petitioner at two meetings of this unit. Scarletto knew petitioner as Joe Castelum or Joe Vega, and knew him to be a member of the Party and the El Sereno unit (R. 63). When, on Party orders in 1949, the El Sereno unit was broken into smaller units for security reasons, both Scarletto and petitioner were transferred to the Mexican Concentration Club (R. 64–65). Petitioner was a regular member of this unit and his membership continued to the latter part of 1950 (R. 64). Scarletto saw petitioner at the closed meetings of the unit (R. 65, 66, 74), and collected Party dues from him during the entire period petitioner was in the Mexican Concentration Club except when petitioner "was transferred out for some other job" (R. 64–65). Scarletto also saw petitioner at a Communist Party convention, at which attendance was restricted solely to Party members; each person seeking admission was required to appear before a screening panel, state his club and position, and be identified by members of the panel before being permitted to enter (R. 66).

Fabian Elorriaga, a member of the Party from 1947 to 1951, testified that he met petitioner at a meeting of the 45th Concentration Club of the Party of which petitioner was a member (R. 67–68). Elorriaga thereafter saw petitioner at regular meetings of the club over a period of three years (R. 69). The

meetings were closed to all but Party members (R. 69). Elorriaga also recalled a restricted executive meeting at which petitioner was present, called either for organizational purposes or to formulate an agenda (R. 69). Later, Elorriaga testified that he recalled two closed meetings of the Concentration Club in 1949 and 1951 which petitioner attended (R. 71).

The special inquiry officer found petitioner deportable as a voluntary member of the Communist Party after entry. An appeal from the order was dismissed by the Board of Immigration Appeals on November 14, 1957 (R. 1–4). The Board found that the testimony introduced by the government established a *prima facie* case of voluntary membership in the Party from late 1948 or early 1949 to at least the end of 1950, which petitioner had made no attempt to rebut.

2. *The first reopening of proceedings and judicial review thereof.*—*a.* On January 13, 1958, after this Court's decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (decided December 9, 1957), petitioner moved the Board for reconsideration of the order of deportation on the ground that his membership in the Communist Party did not meet the requirement of meaningful association laid down by *Rowoldt*. In the event reconsideration was denied, petitioner requested alternatively that proceedings be reopened to permit him to offer testimony to show that under *Rowoldt* he was not deportable (R. 5). On May 12, 1958, the Board ordered the proceedings reopened to permit petitioner to introduce evidence (R. 5–8).

At the reopened hearings before the special inquiry officer on December 16, 1958, petitioner, although voluntarily sworn, presented no testimony. He offered merely a statement by counsel claiming that the Board had misconstrued his request as one seeking an opportunity to offer testimony, and argued that the existing record did not establish meaningful membership within the standards set by *Rowoldt*. The statement suggested that the government present evidence (R. 9–13). The special inquiry officer, on the basis of the record previously considered, reaffirmed his original decision that the petitioner, after entry into this country, had been shown to be a voluntary member of the Communist Party by reasonable, substantial, and probative evidence. On May 18, 1959, the Board of Immigration Appeals dismissed an appeal, finding again that the record, upon which both sides were content to rest, established meaningful membership (R. 13–14).

b. On May 22, 1959, petitioner filed in the district court a complaint for declaratory and injunctive relief against the order of deportation, in which he alleged that the finding of Communist Party membership was based upon unwarranted inferences and that the statute under which deportation was ordered was unconstitutional as applied. The district court granted the government's motion for summary judgment, holding that the case was controlled by this Court's decision in *Galvan* v. *Press*, 347 U.S. 522, rather than by *Rowoldt*.

On December 8, 1960, the court of appeals affirmed

the dismissal of petitioner's complaint in an opinion by Judge Bastian, in which Judge Danaher joined. Judge Edgerton took no part in the consideration or decision of the case (R. 15–22). *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824 (C.A. D.C.). The court noted that the Internal Security Act of 1950 (64 Stat. 987, 1006, 1008) dispensed with the need for proving in each individual case that the alien advocated overthrow of the government by force and violence, as was necessary under the Alien Registration Act of 1940 (54 Stat. 670). Quoting the *Galvan* decision, it stated the test as follows (347 U.S. at 528; R. 20):

> It must be concluded * * * that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.

The court of appeals added (R. 21):

> The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

The court observed that in *Rowoldt* this Court spoke of "meaningful membership" in the context of specific circumstances where the evidence of membership in the Party came from the alien himself who, at the same time, offered an explanation which, if believed, destroyed the inference that he subscribed to Party objectives. The court therefore concluded (R. 21):

> We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan*. Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.
>
> Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and since appellant here failed to offer any evidence whatsoever, the presumption must stand.[1]

In a petition for rehearing (*en banc* or, in the alternative, by a division of the court) petitioner

[1] The court added that the Board did not draw any inference from petitioner's silence, that it (the court of appeals) did not do so, and that it found no occasion to determine under the circumstances whether such an inference could be drawn.

argued that the court's decision was erroneous in holding (1) that the alien had the burden of proving that his membership was not "meaningful"; (2) that the Internal Security Act of 1950 introduced a new presumption of personal advocacy of the violent overthrow of government *following* from organizational membership; and (3) that *Rowoldt* merely made the statutory presumption rebuttable. Petitioner also argued that his case should have been considered by a full division of three rather than two judges.[2] The petition for rehearing was denied on January 9, 1961.

In a petition for a writ of certiorari to this Court, petitioner argued that the evidence was insufficient to support the order of deportation; that the statute providing for deportation was unconstitutional as applied; and that the decision of the court of appeals represented a departure from established principles in shifting to the alien the burden of proving that his membership in the Communist Party was not "meaningful association." On April 3, 1961, this Court denied the writ. *Gastelum-Quinones* v. *Rogers*, 365 U.S. 871.

3. *The present proceedings.*—*a.* On May 4, 1961, following the denial of his petition for a writ of

[2] In a footnote petitioner recited the following:

"At the oral argument counsel were informed that Judge Edgerton was unable to attend the argument because of illness. When asked by the Court, counsel for both sides stated that they acquiesced in Judge Edgerton's participation in the decision without hearing the oral argument. No suggestion was made that the case would be considered by only two judges. The opinion states 'Judge Edgerton took no part in the consideration or decision of this case'."

certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings—this time in order that he might testify that he never personally advocated the overthrow of the government by force and violence. He argued that the court of appeals in its decision had in effect ruled that the crucial issue was whether he personally advocated overthrow of the government by force and violence; that, until the court's decision, neither he nor the government had considered that issue relevant, and that it was neither fair nor constitutional to deport him for failing to offer proof as to something that was not known to be at issue (R. 22–25). In an accompanying affidavit, petitioner swore that he would testify before the Board that "I have never advocated, supported or espoused, nor do I now advocate, support or espouse the overthrow of the government of the United States by force and violence" (R. 26).

After oral argument, the Board of Immigration Appeals on August 1, 1961, refused to reopen the proceedings for a second time (R. 27–32). It ruled, in reliance upon *Galvan*, that the inquiry as to whether an alien personally advocated violence was not material in a deportation proceeding unless it was a part of an effort to show that "he joined the Party accidentally, artificially, or unconsciously in appearance only'." *Galvan* v. *Press*, *supra*, 347 U.S. at 528 (R. 31). It held that the decision of the court of appeals in petitioner's case could not be interpreted as modifying either *Galvan* or *Rowoldt* so as to make deportation dependent upon proof that the alien or

the Party advocated the forceful overthrow of the government. The opinion meant only, the Board concluded, that it is proper for the alien to show nominal membership as a defense; *i.e.*, membership that is involuntary, or accidental, or, as in *Rowoldt*, membership for the purpose of obtaining the bare necessities of life (R. 31). The Board also rejected the argument that the test of membership laid down in relation to criminal prosecutions under the Smith Act in *Scales* v. *United States*, 367 U.S. 203, applied to deportation proceedings. It concluded that in petitioner's case "there is uncontradicted testimony to show that a voluntary meaningful membership existed"; that, at the reopened hearing, petitioner had "been given an opportunity to show that his membership was nominal" but had refused to present evidence on this issue; and that there was "no reason to believe his membership was nominal" (R. 32).

b. Petitioner thereupon instituted in the district court a second action for judicial review, seeking declaratory and injunctive relief upon the claim that the Board's denial of his motion to reopen was unconstitutional and illegal because the evidence which he proffered was crucial under the decision of the court of appeals in his case (R. 32–40). On August 14, 1961, the district court, after a hearing, denied a preliminary injunction finding no error in the Board's ruling. On September 13, 1961, the court of appeals (Judges Danaher and Bastian) denied a motion for a stay of deportation and affirmed the judgment of the district court (R. 48). On September 28, 1961,

the Chief Justice granted a stay until a petition for certiorari was denied or, if it were granted, until the judgment of this Court.[2] On October 15, 1962, certiorari was granted (No. 39, this Term).

On October 25, 1961, the district court, after hearing oral argument, granted the government's motion for summary judgment and dismissed petitioner's complaint (R. 50). Petitioner appealed and the government moved to affirm. This motion came before a division consisting of Circuit Judges Fahy, Danaher, and Bastian, which ordered on February 21, 1962, that it be referred to the division of the court which heard and decided petitioner's original appeal (R. 51). That division had consisted of Circuit Judges Edgerton, Danaher and Bastian. On February 23, 1962, the division of the court to which the motion had been referred affirmed the judgment of the district court. Judge Edgerton took no part in the consideration of the motion (R. 52).

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[2] The order of Chief Justice Warren was as follows:

"Upon consideration of the application of counsel for the petitioner and of the opposition of the Solicitor General thereto,

It is ordered that deportation of the petitioner be, and the same is hereby stayed provided a petition for a writ of certiorari is filed in this Court on or before October 28, 1961. In the event such petition is so filed and is denied, this stay is to automatically terminate. Should the petition be granted this stay is to continue, pending the issuance of the judgment of this Court."

The district court in dismissing petitioner's complaint on October 25, 1961, ordered a stay of deportation to run concurrently with that granted by the order of the Chief Justice.

On March 9, 1962, petitioner filed a petition for a rehearing *en banc*. Again attacking the initial decision as to deportation as erroneous, he argued that each of his three appeals "has been decided by the same two judges and none * * * by three judges," and that his "last appeal was transferred to a panel of which, predictably, only two judges would participate"—a situation which he said was inconsistent with the spirit of 28 U.S.C. 46 (R. 53–55). On May 7, 1962, the petition for rehearing *en banc* was denied (R. 55). The grant of certiorari in No. 293 relates to the affirmance of the order dismissing the complaint.

SUMMARY OF ARGUMENT

I

The Board of Immigration Appeals has broad discretion whether to reopen deportation proceedings after a determination has been made. Petitioner's deportation had been fully litigated, including denial of certiorari by this Court, after the Board reopened the proceedings to allow petitioner to present testimony. The Board did not abuse its discretion in refusing to reopen the deportation proceedings for a second time, when the only basis for the second reopening was petitioner's proffered testimony that he did not personally advocate overthrow of the government by force and violence.

The Board determined, and petitioner admits, that the proffered evidence was immaterial under this Court's decisions in *Galvan* v. *Press*, 347 U.S. 522,

Rowoldt v. *Perfetto*, 355 U.S. 115, and *Niukkanen* v. *McAlexander*, 362 U.S. 390. Those cases held that an alien, to be subject to deportation, need not support the Party's advocacy of violence. It is sufficient if he was "aware that he was joining the organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will"; that is, that the alien did not join the Party "'accidentally, artificially or unconsciously in appearance only.'" *Galvan* v. *Press*, *supra*, 347 U.S. at 528.

Petitioner relies on the earlier court of appeals' opinion in this case to show that evidence concerning the alien's support of violence is relevant. But that opinion cannot overturn the decisions of this Court which petitioner admits are inconsistent with his interpretation of it. While petitioner cites the doctrine of the law of the case, that rule does not apply when the earlier decision was clearly erroneous. We disagree, moreover, with the argument that the prior court of appeals' opinion made it incumbent upon the Board to determine whether petitioner supported violent overthrow. This view is confirmed by the second opinion of the court of appeals, rendered by the same panel, rejecting petitioner's contention that the Board's refusal to reopen was inconsistent with its first decision.

II

The evidence established that petitioner's membership in the Communist Party was meaningful. This issue was fully litigated in the earlier appeal, and

therefore petitioner has an unusually heavy burden in contending that the determinations of the Board were erroneous.

The record here shows that petitioner was an active, dues-paying, voluntary member of the Communist Party who attended meetings limited to Party members from 1949 to 1951. This is meaningful membership under the test laid down in *Galvan*, *Rowoldt*, and *Niukkanen*. Unlike the situation in *Rowoldt*, there is nothing in the record to show that this membership was motivated by considerations other than political ones. Petitioner has declined to suggest this even though proceedings were reopened at his own request to permit him to bring himself within the framework of *Rowoldt*. Once evidence was introduced having a strong tendency to show that he was a knowing member, petitioner took the risk of having the adverse inference drawn unless he came forward with any facts which might rebut the evidence. Even in criminal cases, it is well established that once a *prima facie* case is made a defendant runs the risk of the inferences that may be drawn if he fails to present evidence.

Petitioner claims that *Scales* v. *United States*, 367 U.S. 203, requires proof that he was an active Party member. But that case, approving the test for deportation in *Galvan* and *Rowoldt*, stated a test for criminal prosecution under the Smith Act. In any event, the evidence here plainly shows that petitioner was an active member of the Communist Party.

III

Petitioner contends that, in transferring his case to the same division of the court which had heard his original appeal, the court of appeals knew, or must have known, that the one judge who did not previously sit would not sit again. That this was known does not in fact appear. In no event, moreover, were petitioner's rights violated. Certainly, it was reasonable to have the case transferred to the same panel which had issued the earlier opinion since the basis of petitioner's argument was that the Board had failed to follow the court's directions. The transfer fully met the requirements of 28 U.S.C. 46. The case was referred to a division of three judges, and the required quorum of two judges decided it.

ARGUMENT

I

THE BOARD OF IMMIGRATION APPEALS PROPERLY REFUSED TO REOPEN THE DEPORTATION PROCEEDINGS FOR THE SECOND TIME. IN THE ABSENCE OF ANY EVIDENCE THAT HIS MEMBERSHIP WAS NOT MEANINGFUL, IT WAS NOT MATERIAL WHETHER PETITIONER WOULD TESTIFY THAT HE DID NOT PERSONALLY ADVOCATE VIOLENT OVERTHROW OF THE GOVERNMENT

The Board of Immigration Appeals ordered petitioner deported from the United States as an alien who had been a member of the Communist Party after his entry. Section 241(a)(6)(C)(i) of the Immigration and Naturalization Act of 1952, *supra*, pp. 2–3, specifically provides for the deportation of an

alien who "at any time has been after entry a member of * * * the Communist Party of the United States * * *." Petitioner contends (Br. 17–23) that it was error for the Board to decline to reopen the proceedings for a second time to permit petitioner to offer evidence that he did not personally advocate overthrow of the government by force and violence.

It should be emphasized at the outset that an alien who has been ordered deported does not have an absolute right to have the deportation proceeding reopened. The standard applied by the Board (Finucane, *Procedure Before the Board of Immigration Appeals,* 31 Int. Rel. 31 (1954)) is as follows:

> As a matter of general principle, the Board believes that a case ought to be adequately developed in the first instance, and hence the Board is very reluctant to reopen a case which could have been but was not fully developed at the initial hearing. * * * [T]he Board will not reopen a case except for real and substantial reasons.

See *In the Matter of M———*, 3 I. & N. Dec. 490, 492. The federal courts have uniformly held that the Board's determination whether to permit reopening to reconsider the determination of deportability may be overturned only if the alien demonstrates a clear abuse of discretion. *Rystad* v. *Boyd*, 246 F. 2d 246, 249 (C.A. 9), certiorari denied, 355 U.S. 912; *Dentico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C.A. 2); *United States ex rel. Pappageanakis* v. *Shaughnessy*, 114 F. Supp. 371, 375 (S.D. N.Y.); see Gordon and Rosenfield, *Immigration Law and Procedure* (1959), pp. 51, 585–586. The

courts have likewise held that it is within the discretion of the Board whether to reopen deportation proceedings in order to allow the alien to apply for suspension of deportation. *Arakas* v. *Zimmerman*, 200 F. 2d 322, 325 (C.A. 3); *Wolf* v. *Boyd*, 238 F. 2d 249 (C.A. 9), certiorari denied, 353 U.S. 936; *Jimenez* v. *Barber*, 252 F. 2d 550 (C.A. 9); accord, *In the Matter of M———*, 5 I. & N. Dec. 472, 474–475. Since in this case the Board had once before opened the deportation proceeding on petitioner's request, it had especially broad discretion in determining whether to reopen it again. Litigation must come to an end at some point. Petitioner therefore has a particularly heavy burden—to show that the evidence he wished to introduce was not only relevant, but crucial.

The Board plainly did not abuse its discretion. Petitioner, at the initial hearing, had the opportunity, which he declined, to rebut the government's evidence that he had knowingly joined the Communist Party after entry into the United States. He had the same opportunity at the reopened hearing—which he again declined—to show that this knowing membership was not "meaningful" under the decision of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115. At the stage when he sought a second reopening, he had already had judicial review of the question whether the evidence introduced by the government established the kind of membership in the Communist Party which would subject him to deportation under *Rowoldt*. 286 F. 2d 824, certiorari denied, 365 U.S. 871. Yet, the only evidence which he proffered as the basis for a further

administrative proceeding was his own testimony that he did not advocate the overthrow of the government by force and violence (see the Statement, *supra*, p. 11)—evidence which, if true, would not lead to a different result under *Galvan* v. *Press*, 347 U.S. 522, and subsequent decisions of this Court.

In analysing these decisions, it is useful to review briefly the history of the various enactments which frame the issue. In 1910, Congress provided for the deportation of aliens advocating overthrow of the United States by force and violence. 36 Stat. 263, 264. In 1917, aliens were made deportable if, at any time after entry, they were found to advocate violent overthrow. 39 Stat. 889. The grounds for deportation were extended in 1918 to any alien who was a member of, or affiliated with, any organization which teaches or advocates violent overthrow. 40 Stat. 1012. When this Court in 1940 held that the Act reached only aliens who were current members of subversive organizations (*Kessler* v. *Strecker*, 307 U.S. 22), Congress, the next year, in the Alien Registration Act specifically made all aliens deportable who had any time in the past been members of such organizations. Thus, throughout this period, an alien was deportable only upon proof that he personally advocated, or that he was a member of an organization which was shown to advocate violent overthrow.

In the Internal Security Act of 1950, Congress for the first time provided for the deportation of any alien who had been a member of the Communist Party at any time after entry into the United States.

This provision—which was the immediate predecessor of the 1952 provision involved in this case—on its face eliminated any requirement of proof that the alien personally advocated, or that the organization of which he was a member advocated, violent overthrow. Nonetheless, in *Galvan* v. *Press* this Court was asked to construe the Internal Security Act of 1950 as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence. The Court found that the statute precluded such an interpretation. 347 U.S. at 525–526. It contrasted the language of the subsection providing for deportation of former Communist Party members with that of a subsection providing for deportation of aliens who were members of organizations required to register under the Act (*i.e.*, "Communist-action" and "Communist-front" organizations). It noted that the latter subsection contained an escape provision—"unless such aliens establish that they did not know or have reason to believe at the time they became members or affiliated with such an organization * * * that such organization was a Communist organization." The purpose of this escape provision was, according to Senator McCarran (the sponsor of the Act), to exempt from deportation "aliens who were innocent dupes when they joined a Communist-front organization, as distinguished from a Communist political organization" (such as the Communist Party). See 96 Cong. Rec. 14180. In view of this escape provision for members of other organizations, the Court reasoned that Congress clearly did

not intend to exempt "innocent" members of the Communist Party. 347 U.S. at 526.

The Court also relied on the legislative history of the 1951 statute which amended the Internal Security Act by providing that aliens who had joined an organization advocating violent overthrow when they were children, or by operation of law, or in order to obtain the necessities of life would not be deemed members of the organization. 65 Stat. 28. The legislative history of this statute included repeated references to the fact that "member" was intended to have the same meaning in the 1950 Act as it had been previously given by courts and administrative agencies, and that the judicial and administrative decisions prior to 1950 had not exempted aliens who joined an organization unaware of its programs and purposes. 347 U.S. at 527–528. The sponsor of the 1951 Act, Senator McCarran, inserted in the Congressional Record a memorandum—which this Court called a "weighty gloss on what Congress wrote" (347 U.S. at 527)—which made clear that the Act was not intended to authorize the deportation of aliens who, "accidentally, artificially, or unconsciously in appearance only" were members of the Communist Party. 97 Cong. Rec. 2373; see 347 U.S. at 527.

On the basis of this legislative history, the Court held in *Galvan* that (347 U.S. at 528):

> [S]upport, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. *It is enough that the alien joined the Party, aware that he was joining an organiza-*

> *tion known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.* A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end. [Emphasis added.]

The Court concluded (*id.* at 528) that the alien had not "'accidentally, artificially or unconsciously in appearance only'" joined the Party and (*id.* at 529) that "the record does not show a relationship to the Party so nominal as to make him a 'member' within the terms of the Act." The order of deportation was therefore upheld.

This Court's decision in *Galvan* was in no way overruled by *Rowoldt* v. *Perfetto*, 355 U.S. 115. Instead, the Court affirmed the legal test stated in *Galvan* (*id.* at 120): "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization * * *' [*Galvan* v. *Press*,] 347 U.S. at 528." Applying this test the Court said that since, insofar as the record showed, the alien's reason for joining the Party may have been to earn a living by working in a Party bookstore rather than to support any political cause whatever, "the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implica-

tions." 355 U.S. at 120.* The Court therefore concluded that the government had not proved "meaningful association with the Communist Party" required by the *Galvan* decision.

Only three terms ago, in *Niukkanen* v. *McAlexander*, 362 U.S. 390, the Court again considered whether an alien was deportable as a result of membership in the Communist Party under the Internal Security Act of 1950. Again, the Court applied the standard first laid down in *Galvan* in stating that "[t]he ultimate question is whether petitioner is subject to deportation under *Galvan* v. *Press*, 347 U.S. 522, or is saved from it under *Rowoldt* v. *Perfetto* * * *." 362 U.S. at 391.

Section 241(a)(6)(C)(i) of the Immigration and Nationality Act of 1952, under which petitioner was ordered deported, is virtually identical with the 1950 provision involved in *Galvan*, *Rowoldt*, and *Niukkanen*. The principles announced in *Galvan*, and affirmed in *Rowoldt* and *Niukkanen*, are therefore controlling here. The Board of Immigration Appeals was properly following decisions of this Court when, in refusing to reopen the deportation proceedings, it held that "an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or un-

* The case was not decided under the exception, added by the 1951 amendment, relating to aliens joining the Party in order to obtain the necessities of life.

consciously in appearance only" (R. 31). Petitioner, however, proffered no evidence that his membership was not deliberate and meaningful; his sole offer of proof, if the hearings were reopened a second time, was to testify that he had never supported violent overthrow.

Petitioner himself specifically admits (Pet. Br. 8–9, 13, 20) that evidence as to whether he had personally advocated overthrow of the government by force and violence is immaterial to deportability under *Galvan* and *Rowoldt*. He therefore impliedly concedes that the Board's determination not to reopen the proceedings to hear his testimony on this issue was consistent with the rulings of this Court. Nonetheless, he contends that the Board erred, his theory being that the first opinion of the court of appeals made the issue whether he personally advocated violence material to his deportation.

This argument is plainly unsound. *First,* since the *Galvan* and *Rowoldt* decisions of this Court are of course controlling, it is irrelevant whether petitioner's interpretation of the court of appeals' opinion is correct or not. It is sufficient that the Board correctly followed the decisions of this Court. Petitioner contends (Br. 19-20) that the court of appeals' earlier decision was the law of the case. But as petitioner himself correctly states (Br. 22):

> * * * [T]he law of the case rule is a rule of practice, not a limitation on the court's power, and the court will disregard the rule when, but only when, "a clear case * * * [is] * * * presented showing that the earlier adjudication

> was plainly wrong and that application of the rule would work manifest injustice." *Mayflower Hotel Stockholders Protection Committee* v. *Mayflower Hotel Corp.*, 193 F. 2d 666, 669; *Brown* v. *Gesellschaft Fur Drahtluse Tel.*, 104 F. 2d 227, 228; *Davis* v. *Davis*, 96 F. 2d 512; *Messinger* v. *Anderson*, 225 U.S. 436, 444.

Since petitioner likewise admits that, under his interpretation of the court of appeals' prior decision, that decision was directly in conflict with decisions of this Court, it was plainly wrong and hence not controlling.[8]

Second, the Board's refusal to reopen the deportation proceedings to hear petitioner's testimony that he had never personally advocated violent overthrow is in fact consistent with the earlier court of appeals' opinion. It may be granted that the opinion is not entirely clear (see the Statement, *supra*, pp. 7–9). On the one hand, it quoted *Galvan* v. *Press* to the effect that proof of support or even knowledge of the Party's advocacy of violence was not a prerequisite to deportation. The court of appeals stated that such advocacy was attributed to the individual alien by proof of membership, the legislative finding as to the nature of the Party, and the presumption that a

[8] The court of appeals' interpretation of the Act in its earlier decision should not be binding on the government for an additional reason. Since the government prevailed on that appeal, it could not seek review in this Court. Petitioner, having been unsuccessful in the prior litigation, cannot now claim that the error he asserts the court of appeals made is binding on the government.

member of a political organization espouses the tenets of the organization. On the other hand, in noting that *Rowoldt* neither reversed nor limited *Galvan*, the court did say that *Rowoldt* "amplified" the presumption of support for violent overthrow which the statute draws from membership by making that presumption rebuttable, with the burden on the alien to come forward with an "explanation." As the Board noted, this language as to rebutting the presumption, read in the light of the whole opinion, appears to mean only that (R. 31):

> * * * it is proper to show nominal membership as a defense; i.e., as in *Galvan*, membership that is involuntary, accidental, artificial, or unconsciously in appearance only: or as in *Rowoldt*, membership for the purpose of obtaining food and other necessities by one who presumably would just as well have joined the Salvation Army or one of the major political parties if he could thereby have obtained his necessities.

Any other interpretation of the first court of appeals' opinion would, as we have seen, make the opinion inconsistent with *Galvan* and *Rowoldt*.

The interpretation of the Board of Immigration Appeals has been confirmed, at least insofar as it is relevant here. The Board may or may not have been correct in interpreting the first court of appeals' opinion to mean that the alien could show nominal membership, rather than, as petitioner contends, that the alien has the burden of showing lack of support of violent overthrow. But at the least the Board was

correct in holding that the court of appeals did not mean that an alien could take himself outside the Act merely by his own testimony that he had never supported violent overthrow. For the Board held that petitioner's proffer of testimony on this subject, which was unaccompanied by any other proffer of evidence, was not material to deportability and therefore did not justify reopening the deportation proceedings. Petitioner argued before the court of appeals that the Board's determination was inconsistent with the appellate court's earlier decision. And the same division of the court of appeals which rendered the original opinion, on which petitioner relied, upheld the determination of the Board.

II

THE EVIDENCE ESTABLISHED THAT PETITIONER'S MEMBERSHIP IN THE COMMUNIST PARTY WAS MEANINGFUL

Petitioner also contends (Br. 24–32) that the evidence before the Board was not sufficient to support its finding that petitioner held meaningful membership in the Communist Party so as to make him subject to deportation under Section 241 of the Immigration and Nationality Act of 1952. This issue has been fully litigated and decided contrary to petitioner's contention. The Board of Immigration Appeals stated in its first review (R. 2):

> This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was in-

> voluntary. We believe this record establishes that respondent's membership was voluntary.

Contrary to petitioner's assertion (Br. 27), the Board did not draw an inference from what petitioner has called "bare, organizational membership." In denying petitioner's motion for reconsideration in light of *Rowoldt*, but allowing him to offer additional testimony on this subject, the Board compared petitioner's silence and the period of association with that of Rowoldt (R. 7): "Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it." After reopening, the Board found (R. 14):

> Both sides are content to rest upon the record. The record establishes membership. *We believe it establishes meaningful membership.* Our previous opinion has set forth our reasoning. [Emphasis added.]

The district court and the court of appeals—applying, as we have shown above, the proper tests—considered the facts in detail in reviewing the Board's determination and sustained its findings (see the Statement, *supra*, pp. 7–9). The evidentiary issue was relied on in the petition for a writ of certiorari, which this Court denied. Since the issue of sufficiency of the evidence was fully litigated, petitioner has, at the very least, a heavy burden in claiming that the earlier determinations were erroneous. This Court has held that it will not normally reassess administrative findings which have been carefully

considered by the lower courts. *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400–401; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503. *A fortiori*, in the absence of plain error, the prior review of the Board's findings in litigation taken to the highest Court must be held controlling.

Even if one assumes that petitioner is entitled to relitigate *de novo* the sufficiency of the evidence, we submit that the lower courts were correct in determining that the Board's findings were amply supported by the evidence. Indeed, even if one considers and credits petitioner's proffer of testimony that he never supported violent overthrow of the government, the evidence still demonstrates meaningful membership justifying deportation. For, as we have seen, the test of membership under the decisions of this Court is whether the alien freely joined the Communist Party as a distinct political organization, not whether he intended to support the Party's objective of overthrow of the government by force and violence.

In *Galvan* v. *Press*, the Court, applying this test, found that the facts showed that the alien was deportable. It sustained the hearing officer's finding that Galvan had been a "member" of the Communist Party from 1944 to 1946 on the basis of (1) Galvan's admissions, subsequently denied, that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing such membership, and (2) the testimony of a witness that Galvan had been an officer of a Communist Party unit. The

Court noted that there had been no claim that membership was obtained " 'accidentally, artificially, or unconsciously in appearance only' " (347 U.S. at 528), and concluded that the record did not show a relationship to the Party so "nominal" as not to make Galvan a "'member" within the terms of the Act (*id.* at 529).

In *Rowoldt* v. *Perfetto*, the Court applied the principles announced in *Galvan* to a different factual situation. On appraisal of the particular circumstances in *Rowoldt*, however, the Court found the evidence too insubstantial to show any meaningful membership. The evidence consisted solely of the testimony of Rowoldt before an immigration inspector,* that, while he had belonged to the Communist Party for a year in 1935, he viewed the Party as having one aim, "to get something to eat for the people" 355 U.S. at 117. In view of Rowoldt's unchallenged account of his relations to the Party—his statements that membership had been motivated by a "fight for something to eat and clothes and shelter" and "fighting for the daily needs"—the Court found that "the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political implications'." *Id.* at 120. The Court noted that "[t]he differences on the facts between *Galvan* v. *Press*, *supra*, and this case are too obvious to be detailed." *Id.* at 121.

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* At later deportation hearings Rowoldt had refused to answer whether he had been a member of the Communist Party on the ground that the answers might incriminate him.

Subsequently, in *Niukkanen* v. *McAlexander, supra*, the Court had before it a record showing that two ex-members of the Communist Party had testified that the alien was a card-carrying, dues-paying, meeting-attending member of the Communist Party from 1937 to 1939 and that the alien, after having initially refused to testify, thereafter denied, in administrative proceedings and before the district court, that he had ever knowingly been a member of the Communist Party. The Court said (362 U.S. at 391):

> The determination of this issue turns on evaluation of the testimony before the District Court in the light of *Galvan* v. *Press*, *supra*, and *Rowoldt* v. *Perfetto*, *supra*.

The Court affirmed, *per curiam*, the judgments of the lower courts sustaining the order of deportation. The Court said that the case was unlike *Rowoldt* since there the alien had "admitted membership, see 355 U.S., at 116–117, but accounted for its innocence." In *Niukkanen*, in contrast—the trial judge had indicated his belief that the alien, in denying membership, had perjured himself. The Court therefore emphasized that the solution of the issue largely depended upon the credibility of testimony which the district judge heard, and the Court stated that it could not say that the lower court's findings were erroneous.

The facts in this case show that petitioner, like Galvan and Niukkanen and unlike Rowoldt, was an active, dues-paying, voluntary member of the Communist Party who attended meetings limited to Party members. Two witnesses, who the trier of facts believed, testified that petitioner had been a regu-

lar member of a Communist Party unit from early 1949 until 1951, had paid Party dues for two years, had attended numerous closed meetings of that unit, and had attended a Party convention and a Party executive meeting where those seeking admission were likewise screened (see the Statement, *supra*, pp. 4–6).

Measured by the determinations of this Court in *Galvan* and *Niukkanen*, or by any other meaningful standard, this is not a record of nominal membership. See also *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, 355 U.S. 912; *United States ex. rel. Avramovich* v. *Lehmann*, 235 F. 2d 260 (C.A. 6), certiorari denied, 355 U.S. 905. As in *Galvan* there has been no claim by petitioner that this alleged membership was obtained "'accidentally, artificially or unconsciously in appearance only'." Unlike *Rowoldt*, there is nothing in this record which could suggest that petitioner's alleged association was motivated by considerations other than political. Petitioner made no such suggestion, even though the deportation proceedings were reopened at his request to permit him to show that he came within the holding of *Rowoldt*. Moreover, petitioner's membership, unlike that of the other aliens whose cases have come before this Court,[7] extended from early 1949 to 1951, which was not a period of depression or of general lack of consciousness of the operation of the Communist Party as a distinct and active political organization.

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[7] The alleged membership of Galvan was shown to have lasted from 1944 to 1946; that of Rowoldt during the year 1935; that of Niukkanen from 1937 to 1939.

Had there been facts which might have tended to show lack of consciousness of political implications, petitioner was required, as the court of appeals held in its first decision (R. 21), to come forward with them. See also *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814; *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, 355 U.S. 912. There is nothing unreasonable about placing upon the alien the burden of overcoming the inference of conscious membership that may naturally be drawn from proof of active participation. It is far more than a fair inference that members of an organization who attend numerous meetings and pay dues regularly over a period of years know whether it is a distinct political organization. In the rare instances where a member lacks this elementary information, his state of mind is a matter peculiarly within his own knowledge. Even in criminal cases it is well established that an adverse inference drawn from the prosecution's case may be strengthened by the failure of a party having knowledge to present evidence which it would be almost impossible to ascertain from any other source. *E.g.*, *Casey* v. *United States*, 276 U.S. 413, 418; *Faraone* v. *United States*, 259 Fed. 507 (C.A. 6); *Jencks* v. *United States*, 226 F. 2d 540, 548–549 (C.A. 5), reversed on other grounds, 353 U.S. 657; Wharton's *Criminal Evidence* (11th ed. 1935), Section 201. In short, the evidence of petitioner's Party activities amply sustains the Board's findings that petitioner was a meaningful member of the Communist Party; if petitioner had any evidence to show that he lacked the requisite

understanding, it was his responsibility to present it.

Contrary to petitioner's claim (Br. 27–32), we are not suggesting that petitioner had the burden of proof to show that he was not deportable. Instead, we contend, as the court of appeals held (R. 21), that petitioner, rather than the government, was required to go forward with any evidence concerning his subjective intent once the government's evidence laid the basis for an inference of knowing membership. When evidence on both sides is presented, the Board is required to evaluate it on the usual basis that the government had the burden to prove meaningful membership in the Communist Party. Since the government did present evidence sufficient to establish meaningful membership and petitioner offered no evidence to rebut it, the Board properly found that the government's burden had been sustained.

As earlier observed, the evidence which petitioner proffered in seeking a second reopening of the administrative hearing could not possibly have changed the result. Petitioner sought merely to testify that he had never supported violent overthrow of the government. But, as argued above (pp. 20–28), this testimony bears no relation to whether petitioner deliberately became a member of the Communist Party as a distinct political organization—the test prescribed by this Court in *Galvan*, *Rowoldt*, and *Niukkanen*.

Petitioner contends (Br. 24–27) that the test of membership as announced in *Rowoldt* has been circumscribed by *Scales* v. *United States*, 367 U.S. 203,

to include only active members. That case, however, set forth the test of membership for the purposes of criminal prosecution under the Smith Act. The decision in *Scales* observes that the provision for the deportation of aliens "rested on Congress' far more plenary power over aliens" and "did not press nearly so closely on the limits of constitutionality as this enactment." *Id.* at 222. It does state, to be sure, that "membership" for purposes of deportation means "more than the mere voluntary listing of a person's name on Party rolls," citing both *Galvan* and *Rowoldt*. *Ibid.* But this is only to state, as we concede, that mere membership in the Communist Party is not sufficient for either criminal prosecution or deportation. It gives no basis whatever for suggesting that the Court was overruling, *sub silentio*, its repeated holdings as to the applicable test in deportation proceedings.

Petitioner's argument fails for another reason. Even if one were to import into the deportation statutes a requirement of "active" membership, the unchallenged evidence shows that petitioner was active. In *Scales*, the Court stated (367 U.S. at 233, note 15):

> The element of "activity" in the proscribed membership stands apart from the ingredient of guilty "knowledge" in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities.

It cannot be seriously questioned that petitioner was active in "general Party affairs." Paying dues, attending closed meetings, participating in an executive session of a Party unit, and appearing at a Party convention certainly constitute ample proof of activity. Against this, petitioner offered only to testify that he did not advocate violent overthrow—a matter quite discrete, as the *Scales* decision itself points out, from the question of active membership.

III

PETITIONER'S APPEAL WAS DECIDED BY A LAWFULLY CONSTITUTED DIVISION OF THE COURT OF APPEALS

Petitioner argues (Br. 33–34) that in this second round of litigation the composition of the court was improper. Petitioner's first appeal came before a division consisting of Judges Edgerton, Danaher, and Bastian, but Judge Edgerton did not participate in the decision. On petitioner's appeal from the dismissal of his complaint urging that the Board had erroneously refused to reopen deportation proceedings for the second time, the government's motion to affirm came before a division consisting of Judges Fahy, Danaher, and Bastian. This division ordered the case transferred to the division which had heard and decided petitioner's original appeal. Petitioner contends that this transfer "violated at least the spirit" of 28 U.S.C. 46, since it was "clearly predictable" that Judge Edgerton would not sit and that therefore his appeal would in effect be decided by the two-judge division which had previously decided against him.

Considering that the whole basis of petitioner's attack on the Board's action was that it was inconsistent with the earlier court of appeals' opinion, it was certainly reasonable to refer the case to the panel which had written the opinion. If, as petitioner asserts but does not establish, it was known that Judge Edgerton would not sit,* it would have been appropriate to appoint a new third member of the division. But this in no event makes out a violation of 28 U.S.C. 46, *supra*, p. 3. Subsection (a) provides that circuit judges shall sit on the court and its divisions in such order and at such times as the court directs; subsection (b) states that the court may authorize the hearing and determination of cases and controversies by separate divisions—each consisting of three judges—to sit at the times and places and hear the cases and controversies assigned as the court directs; subsection (c) provides that cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing in banc is ordered; and subsection (d) says that a majority of the judges authorized to constitute a court or division shall constitute a quorum. Thus, 26 U.S.C. 46 provides that a division shall consist of three judges with two making up a quorum.

* The record is silent why Judge Edgerton did not sit on the first appeal. In his petition for rehearing of the court of appeals' first decision, petitioner indicated that it was because of illness, a reason which does not support the speculation that it must have been known that Judge Edgerton would not participate the subsequent year.

Petitioner's case was referred to a division with the permissible complement of judges and the required quorum decided it. Petitioner has twice had full review by the court of appeals on basically the same issues. He can hardly complain that he has not had his day in court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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JOSE MARIA GASTELUM-QUINONES, *Petitioner*,

v.

ROBERT F. KENNEDY, *Attorney General of the United States*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE BOARD OF IMMIGRATION APPEALS WAS REQUIRED TO APPLY THE LAW OF THE CASE ESTABLISHED BY THE COURT OF APPEALS

In our main brief (pp. 17-22) we established two propositions: (1) Under the decision of the Court of Appeals in the original case, petitioner was entitled to offer evidence to show that he did not personally

espouse violent overthrow of the government; and (2) under the doctrine of the law of the case, this ruling was binding upon the Board of Immigration Appeals and the District Court. It followed, therefore, that if both these propositions are sound, the Board of Immigration Appeals erred in rejecting petitioner's motion to reopen. The government makes no clear response to either of these propositions.

A. The Meaning of the First Decision of the Court of Appeals

In response to our demonstration as to the meaning of the first decision of the Court of Appeals, the government makes several arguments, all either erroneous or irrelevant.

(1) It argues first at some length (pp. 17-25) that under the decisions of this Court, the evidence proffered by the petitioner in his motion to reopen was irrelevant. But this proves only that the Court of Appeals ruling was inconsistent with the decisions of this Court. It was hardly necessary for the government to argue at such length a proposition which we not only conceded, but asserted repeatedly throughout our brief (see pp. 8, 9, 10, 20, 21, 22, 23). The issue here, however, is what the law of the case was as established by the decision of the Court of Appeals, not whether that decision was correct.

(2) Secondly, the government argues (pp. 26-27) that the opinion of the Court of Appeals "is not entirely clear." It points, however, to no lack of clarity in the opinion itself, but shows only what has already been demonstrated and conceded, i.e., that the opinion is clearly erroneous since it is inconsistent with the opinions of this Court. The excerpts set forth in our

brief (pp. 17-18) demonstrate that the opinion, although erroneous, is crystal clear.

(3) Thirdly, according to the government (pp. 27-28), it must be assumed that the Board of Immigration Appeals correctly applied the ruling of the Court of Appeals, since its decision was affirmed by the Court of Appeals. But the BIA refused to follow the reasoning of the Court of Appeals that deportability rested on a statutory presumption of espousal of unlawful overthrow which was rebuttable, on the ground that to do so would be in conflict with the decisions of this Court. In affirming the BIA ruling, the Court of Appeals did not express agreement with the BIA's treatment of its opinion. Even under the government's view the opinion was "not entirely clear" and hence called for, at the minimum, clarification. The Court of Appeals, however, when faced with the impossible task of reconciling its prior decision with the action of the BIA, simply washed its hands of the matter, deciding the new appeals summarily and without explanation. Its conduct does not justify an inference that it had abandoned its earlier erroneous reasoning, or that it approved of the BIA's interpretation of its opinion. Its affirmance shows only that it affirmed without any reasoning. If an inference is to be drawn, the fair one is that the Court, although resolving to affirm, found it impossible, in the light of its earlier decision, to articulate the rationale for its action.

(4) The government suggests (p. 26, fn. 5) that, in any event, the Court of Appeals decision should not be binding on the government. It argues that "since the government prevailed on that appeal, it could not seek review in this Court." It is true that the

erroneous legal analysis upon which the court based its original decision was original with the court and was in no way induced by the government. But the government's role thereafter was not that of a mere innocent bystander. As the government notes in its brief (p. 10), petitioner immediately brought to the attention of the court the fact that its decision was based on erroneous legal premises, and requested a rehearing on that ground. It would have been entirely appropriate for the government at that stage to inform the court that although, in the government's view, it had reached the correct result, the reasoning it had employed was unsound and in conflict with the decisions of this Court. Indeed, the government should properly have been more concerned to have the Court of Appeals enunciate and apply the correct rule of law, rather than to have petitioner deported on an erroneous theory.

Again, when petitioner applied to this Court for certiorari in No. 711, October Term, 1960, it would have been entirely appropriate for the government to state that it considered the ruling of the Court of Appeals correct as to result but at the same time to advise the Court that the legal theory of the appellate court was erroneous. Instead it erroneously represented (p. 7, Gov. Opp. in No. 711, Oct. Term, 1960) that the decision of the appellate court involved only an "evaluation of testimony," and not the formulation of a novel legal theory.

Finally, in this litigation it was still open for the government to state to the appellate court that its prior decision was correct in result although wrong in theory. Instead it successfully urged the court to adopt the course it did take, i.e., to affirm the deporta-

tion order without examining the validity of its prior ruling. This zeal to deport the petitioner regardless of the soundness of the underlying legal theory does not reflect credit on the government. And as we shall show (*infra*, pp. 6-8), the same zeal leads the government to urge petitioner's deportation on the basis of alleged facts neither found by the BIA nor justified by the record.

B. The Law of the Case Was Binding on the Board of Immigration Appeals

On this score, the government argues (pp. 25-26) that, since the Court of Appeals' decision was erroneous and in conflict with the decisions of this Court, it was not controlling on the BIA. However, it cites no authority for this proposition except to quote, out of context, a paragraph from our brief stating that the law of the case rule is not binding on the appellate court that originally decided the case. There is no question, however, that the law of the case rule is binding on all lower tribunals (see authorities cited in our main brief, p. 19), regardless of the correctness of the ruling. Indeed, it would be impossible to have an orderly system of law, if a lower tribunal were bound by the decision of a higher court only whn the lower tribunal agreed with that decision.

Unlike the lower tribunal, the appellate tribunal has the option of either following the law of the case as set by its previous decision, or discarding its prior ruling and reexamining the case anew. But the Court of Appeals here took neither of these only two permissible courses.

II. PETITIONER IS NOT DEPORTABLE BECAUSE THE SERVICE FAILED TO PROVE THAT HIS MEMBERSHIP IN THE COMMUNIST PARTY WAS A "MEANINGFUL ASSOCIATION" OR "ACTIVE"

The government contends (pp. 28-34) that in any event, the record will support a finding of meaningful membership by the petitioner within the doctrine of the *Rowoldt* case. It argues (pp. 29-30) that this Court should not "reassess administrative findings which have been carefully considered by the lower courts." But it is the government that quarrels with the findings of fact made by the BIA, not we. The BIA found only that petitioner attended some meetings and paid dues.[1] We argued (pp. 24-27) that this alone does not satisfy the requirement of meaningful association established by *Rowoldt* and still less the standard of "active" membership as later established by *Scales*. The government does not dispute this as a proposition of law. It argues instead that the facts show more and lists (pp. 32-33) the facts that it considers crucial to distinguish petitioner's case from that of Rowoldt's. But none of these factual findings relied on by the government were made by the BIA. Thus the Board *did not find:*

(1) That petitioner was an "active" member of the Party.

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[1] It is true that the Board found that the evidence established "meaningful membership" (R. 14). This was not a finding of fact, however. It was a conclusion of law which the Board derived from its factual findings; i.e., in the Board's view attending some meetings and paying dues was sufficient to satisfy the *Rowoldt* requirement.

(2) That he had been a "regular" member of the Party from early 1949 until 1951.[2]

(3) That petitioner attended "numerous closed meetings" of his Party unit. The Board found only that petitioner attended meetings.[3]

(4) That petitioner had attended a Party convention.[4]

(5) That petitioner had attended a Party executive meeting.[5]

[2] Contrary to the assertion of the government, the BIA did not credit the testimony of two witnesses. It credited only the witness Scarletto, considering the witness Elorriaga to be merely corroborative (R. 4, 6). Scarletto testified that petitioner "just went once in a while" to Party meetings (R. 64).

[3] Scarletto testified that his Communist Party club met regularly once a week at the home of a different member of the club (R. 61-62). Nevertheless, over the two year period, Scarletto could only recall seeing the petitioner at "several" of those meetings — "it could be 15, 16 times" but he could not recall (R. 74). No meetings were ever held at petitioner's home (R. 65).

As stated by the BIA (R. 4), Elorriaga testified at one point in his testimony that he had seen petitioner at about 3 or 4 meetings a month over a three year period. At another point he testified that he had seen the petitioner only at 2 or 3 meetings in toto. The BIA said it would not resolve the conflict but would "regard Elorriaga's testimony as corroborative" only.

[4] The BIA's refusal to make such a finding is probably accounted for by the following testimony of Scarletto (R. 66):

"Q. Do you know whether Joe Gastelum ever attended any such [Party] convention?

"A. I saw him at one convention one time."

"Q. Do you know whether he was there on [sic] an official capacity?

"A. No."

[5] The government's record reference for this alleged incident was to the testimony of the witness Elorriaga (R. 69). But the BIA did not credit the details of Elorriaga's testimony. It found him to be merely "corroborative."

In contrast to its reliance on these facts not found by the BIA, the government ignores entirely the crucial fact which the BIA did find—viz: "There was little development of the [petitioner's] awareness of the fact that he belonged to a political organization" (R. 8).

It is plain that the theory of the BIA was that it was sufficient to justify the petitioner's deportation if it found that petitioner had attended some Communist Party meetings and paid dues, and it found no more than that.* Since that was the basis for the Board's finding and the rationale for its conclusion that petitioner's membership was meaningful, that is the only basis upon which its decision can be defended here. It is not open for the government to argue here that the BIA could have made other findings of fact, and could have found deportability on a different theory. *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156, 168-9.

As we noted in our main brief (p. 27) the BIA compensated for the lack of affirmative proof of meaningful membership by advancing the novel theory that proof of bare organizational membership shifted to the alien the burden of showing that his membership was not a meaningful association as required by *Rowoldt*. As a consequence of its abandonment of the rationale upon which the BIA rested its decision, the government makes no effort to defend

*In discussing the contradiction in Elorriaga's testimony, the Board expressly noted that it found it unnecessary to resolve the inconsistency, since, in its view, it made no difference whether petitioner attended only two meetings of the Communist Party over a period of years, or whether petitioner attended meetings regularly three or four times a month (R. 4).

this novel theory,[1] or to respond to our argument (pp. 27-32) that this theory is invalid.

There is nothing in this Court's opinion in *Niukkanen v. McAlexander*, 362 U.S. 390, that would justify petitioner's deportation. The Court, in a per curiam opinion, held that the alien was deportable on the basis of the findings made by the Court of Appeals below. According to the Court of Appeals, Niukkanen "actively participated in discussions . . . of the policies of the party and the circulation of [a] newspaper as a party organ"; Niukkanen "was not an ordinary member of the Communist Party, but belonged to what members of the party called the 'top fraction'"; he "actively participated in party councils, and was considered to be in a relatively high regional echelon of the party," 265 F. 2d 825, at 828-9. Thus in both *Galvan v. Press*, 347 U.S. 522, and in *Niukkanen*, the Court held aliens deportable on the basis of records which showed their activity in the Party to be much greater than that of the alien in *Rowoldt*, and hence a "meaningful association." But neither case will support the deportation of the petitioner, whose activity in the Party was less than that of Rowoldt.

Respectfully submitted,

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[1] The government states (Br. 35): "we are not suggesting that petitioner had the burden of proof to show that he was not deportable."